MAY 1958 • Volume 44 • Number 5

American Bar Association JOURNAL

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May, 1958

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1155 East 60th Street, Chicago 37, Illinois.
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The President's Page

Charles S. Rhyne

We of the organized Bar have been talking for years about the necessity of co-ordinating the efforts of national, state and local bar associations on matters of mutual interest. We have had some excellent examples of success with co-ordinated effort on certain ideas and programs. But no co-ordinated effort of the organized Bar has ever approached the success we have achieved on "Law Day—U.S.A." This is an accomplishment of which every lawyer can be proud.

The American Bar Association served as a centralized information clearing house to channel information, ideas and experience to the 1400 state and local bar associations. State bar associations assumed responsibility for those things that had to be done on a statewide basis. And local bar associations did the spade work at the local community level. Bar leaders learned once again that lawyers want to work on public service programs and that they will work when given the opportunity to do so.

Virtually every high school and civic club in our country had a speaker who spoke on the vital place of law in our lives and the way in which individual freedom under law distinguishes our system from Communism. From this outpouring of information and this activity have resulted a strengthened government under law through increased respect for law and increased recognition of its important part in our national life.

It has been a thrilling experience to watch this "Law Day—U.S.A." operation from a position at the summit of the organized Bar. Not only has it been most pleasing to see the organized Bar functioning at its best, but the cooperation we have received from more than fifty lay organizations has been most gratifying. Endorsement, cooperation, publicity in many forms, so-called "prestige ads" by businesses of various kinds helped make "Law Day —U.S.A." a most significant occasion. Newspaper stories and editorials, magazine articles, radio and TV coverage of speeches as well as public service "spot" announcements helped insure maximum impact of the idea of "Law Day—U.S.A." upon all Americans. School children, farmers, workers, bankers, businessmen, veterans, club members, professional men, churchmen and others, organized and unorganized, were thus reminded on May 1 in an unprecedented and concerted way that every person's life is affected by the law, and that we in America live by and under the rule of law. There are today so many unthinking attacks upon our governmental institutions—legislative, executive and judicial—that "Law Day—U.S.A." has served a most constructive purpose in affirmatively reminding our people that, even with its faults, ours is still the best system of government yet devised by mankind.

I should like to thank the entire legal profession for the unselfish way in which they went about the task of making this first "Law Day—U.S.A." a most meaningful occasion. Valuable time was taken from busy law practices to do the necessary work. I should like to thank also the many law organizations who joined with us to publicize the idea of the fundamental importance of law in the life of Americans in the past, at the present and in the future.

We lawyers by our achievements on the "Law Day—U.S.A." program have lived up to what John W. Davis, former President of our Association, described as our supreme function: "To be sleepless sentinels on the ramparts of human liberty and there to sound the alarm wherever an enemy appears."

"Law Day—U.S.A." has had the result of rededicating the people of America to the most essential ingredient of our way of life—the rule of law. Such meaningful recognition of law and what it has meant and can mean to individual freedom in our nation should aid immeasurably in defending our people against the subversive peril of the constant war of words aimed at the minds of men by the Kremlin's false propaganda in its ceaseless fight to achieve world domination. With the military situation such that peace is being maintained, as Sir Winston Churchill so incisively said, "by mutual terror", the determinative battle for control of the world is being fought out in this propaganda battle of ideas, ideals and accomplishments. If we are to win that battle our people must realize and appreciate the value to them of our government under law. Such realization and appreciation should be one major, lasting result of "Law Day—U.S.A."

Since people will respect only that which is worthy of respect, the main effort of the legal profession as a

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Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.

Retirement of Judges

"The Age of Judges and the Judge of Ages" by James C. Sheppard of the Los Angeles Bar, brings to mind the long seven-year campaign, finally rewarded in 1952, to fix a constitutional age limit for judges in the State of Washington. Our judges are elected: supreme court judges for six-year terms, and superior court judges (our trial judges of general jurisdiction) for four-year terms.

In 1945, owing to several extreme cases of over-age, the Seattle Bar Association (the largest local bar in the state) agitated and resolved in favor of judicial retirement at age 70. The Committee on Retirement of Judges of the state Bar (specially appointed to wrestle with the problem) found that the judges of the state supreme court were opposed to any limit less than 75 years. It was further ascertained that a number of the superior court judges were opposed to any limit if it affected them personally, largely because pension provisions were not then as liberal as now. The Bar voted seven to one in favor of mandatory retirement not later than 75.

The state bar committee's studies and reports pointed out the reasons why the decision should be reached on the basis of a sound general principle relating to age and the satisfactory performance of the judicial function, rather than on such rare exceptions as Mr. Justice Holmes. The committee favored the New York constitutional provision making retirement compulsory at the end of the calendar year in which the judge attained the age of 70. *Washington State Bar News*, December, 1950, page 45; July, 1949, page 74. But it was found that so long as some distinguished judges opposed it, it was impossible to get the legislature to submit the necessary constitutional amendment.

After six years of effort an amendment was jointly drafted by the State Judicial Council, and the state bar committee, with the approval of the Superior Court Judges Association and of the judges of the state supreme court. As submitted to the legislature in 1951 by the Judicial Council, with the endorsement of all groups interested, the proposed amendment was as follows:

AMENDMENT 25

Art. IV § 3(a). [Retirement of Judges of Supreme Court and Superior Courts.] A judge of the supreme court or the superior court shall retire from judicial office at the end of the calendar year in which he attains the age of seventy-five years. The legislature may, from time to time, fix a lesser age for mandatory retirement, not earlier than the end of the calendar year in which any such judge attains the age of seventy years, as the legislature deems proper. This provision shall not affect the term to which any such judge shall have been elected or appointed prior to, or at the time of, approval and ratification of this provision. Notwithstanding the limitations of this section, the legislature may by general law authorize or require the retirement of judges for physical or mental disability, or any cause rendering judges incapable of performing their judicial duties.

This draft satisfied the Seattle Bar Association because it fixed a limit of 75 years and authorized the legislature to cut the age to 70. It satisfied the state supreme court judges who favored 75 years; and it satisfied the superior court judges because it was inapplicable to any incumbent judge during the terms for which they were last elected.

Result: The legislature proposed the bill in 1951; and in the general election of 1952, it was, with great press support and no opposition, overwhelmingly approved by the people.

Effect: Within two years the effects began to be noticeable; in four years they were significant. Certain judges did not run again for fractional terms of less than four or six years, knowing that it would be difficult if not impossible to get the support of the Bar and to win. Improvements in judicial pensions were most helpful. In practical result, a judge does not run again if his current term expires when he is 73 or even 72. The results have been so satisfactory that there has been no demand on the legislature to lower the retirement age further.

Whenever further legislative action is indicated, it can doubtless be accomplished in the same painless fashion by not making the reduction applicable to present incumbents who might otherwise be affected. Very soon, nevertheless, the formula begins to work and in a few years is in full command. Actually under an elective system like ours, compulsory retirement at 70 would in most cases bring on retirement at 67 or 68.

In the national domain, a federal judge holds his constitutional office during good behavior (*quamdiu se bene gesserit*, following the precedent of the British Act of Settlement of 1700), so that the term is for life ("with no power in Congress to provide otherwise", "*Ex parte Bakelite Corporation*, 279 U.S. 438, 449) unless a judge resigns, or unless by successful impeachment he is removed from office.

Hence, short of constitutional change, a federal judge, even though entitled to resign or retire on full salary (28

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published monthly

American Bar Association Journal

the official organ of the American Bar Association

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

There are eighteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Family Law; Insurance, Negligence and Compensation Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral and Natural Resources Law; Municipal Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

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Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois.

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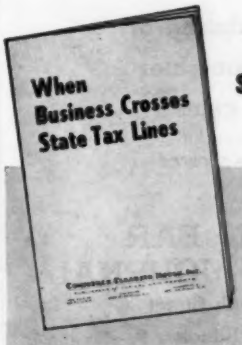

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BELL TELEPHONE SYSTEM

(Continued from page 400)

U.S.C.A. § 371), cannot be compulsorily retired. There is, however, the possibility that Congress under the "necessary and proper clause", might, for other than present incumbents, reduce pension rights unless a judge resigned or retired at the age, let us say, of 70 years. Within a reasonable time this formula would take over, if no constitutional amendment seems feasible. Under the 1954 amendment of Section 371 the President may appoint, by and with the advice and consent of the Senate, a successor to a judge or justice who retires.

The effort in 1937 to add judges to the federal courts at all levels in the same number as failed to retire at age 70 (the court packing plan) failed of passage because of the apparent objective of subordinating the federal courts to the executive and changing the decisional direction of the courts. See AMERICAN BAR ASSOCIATION JOURNAL, April, May, June, July, and August, 1937.

The House of Delegates of the American Bar Association in 1953, 1954 and 1955 approved an amendment to the Federal Constitution protecting the jurisdiction of the Supreme Court, disqualifying any member of the Supreme Court for five years after leaving the bench from holding the office of either President or Vice President, and providing for compulsory retirement at age 75 of all federal judges. 80 *American Bar Association Reports* 400-1, 428. The proposal was passed by the Senate in 1954, but died in the House, and appears momentarily to be dormant.

JOHN N. RUPP

Seattle, Washington

Basic English and Law Students

The courses in writing of briefs and memoranda described in Dean Rasco's article in the November JOURNAL must be helpful to all law students, and are a proper part of any law school curriculum. The special courses to remedy the students' inability to read and write the English language are another matter, and should not be adopted by any law school except as a temporary measure.

Students everywhere have been neglected in the teaching of English. At the University of Alaska, about 35 per cent of the entering freshmen are required to take a course called "English A" officially and "bonehead" or "dummy" English unofficially. About 30 per cent of the students enrolled in the standard freshman English course should be in the bonehead course but are not. Most students cannot write intelligibly, have no real notion of the function of punctuation, spell miserably, and regard assignments of expository writing as impositions. This is true at most points between Florida and Alaska.

Students have not been required in public schools anywhere to do any substantial amount of writing (or reading) and the neglect has led to the basic English deficiency of which Dean Rasco writes. Our whole nation suffers as a result; a person who cannot read cannot inform himself or speak or write so as to exercise his duties as a citizen intelligently, nor can he learn adequately in any field requiring the acquisition of abstract ideas. The English deficiency is typical of deficiencies in all the academic work —students have no appreciable knowledge of mathematics, the sciences, or any other language. We have seen a

(Continued on page 408)

FOUR BASIC BOOKS FOR THE BUSY ATTORNEY

by Marshall Houts

Member of the Tennessee and Minnesota Bars
Formerly, Special Agent of the Federal Bureau of Investigation
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Judge General Counsel to The Court of Last Resort

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Attorneys will find here an invaluable description of the *processes of criminal justice as they operate in actual practice.* The book is concise and easy to read and is not loaded down with elaborate footnotes or case citations. Describes:

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The Trial
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The Release of Innocent Men

In addition to accurately stating the law governing each of these procedures, the author points out the need for remedial changes which will permit the Common Law System to attain its fullest potential.

To be published summer 1958

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Space is provided at the end of each rule for the reader to make his own notes on STATUTES and LEADING CASES applicable in his own jurisdiction for permanent, convenient reference.

An effort has been made to state the FUNDAMENTAL RULES as concisely and accurately as possible, without comment or embellishment. The tangents of individual cases are omitted; but where conflict exists among the various courts on the basic rules, this is pointed out.

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An ever-increasing number of cases which come into a lawyer's office or doctor's waiting room involve problems which require the services of both physician and attorney. Before this book was begun questionnaires were mailed to leading attorneys all over the country, asking them *what they wanted and needed in this field.*

They requested a *basic orientation* in a number of medical subjects which would permit them to recognize medicolegal problems and then discuss them intelligently with their chosen experts.

WRITTEN BY DOCTORS FOR LAWYERS IN LANGUAGE THE LAYMAN CAN UNDERSTAND

The book gives a basic anatomical approach to medical subjects, discusses diagnosis, causation, treatment and prognosis.

To be published summer 1958

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further danger to our country illustrated by Sputniki I and II.

Dean Rasco's plan, as an expedient, is admirable. The students graduated from his school during this time should be better lawyers than average. However, to adopt his plan as a permanent measure will be to encourage the public schools which prepare his students to continue in their neglect of the language. Instead of accepting the situation, the law schools, all of them and not only the University of Miami, should make it plain that beginning in 1960-65 no students whose knowledge of English is deficient will be admitted to the school. Students refused admission and their parents will begin a movement to restore English as an important part of the curriculum of the lower schools—more important than automobile driving, life adjustments, manual training, physical education, and all the other non-academic courses consuming so much of the student's time in high school and the upper grades.

The indictment of the high school in the preceding paragraph must be brought against the colleges as well. Colleges throughout the country accept students whose knowledge of the language is nearly non-existent. Some effort is made through special courses to improve their knowledge but not enough. In the colleges as in the schools of law, students whose knowledge of English is inadequate should be refused admission. Only in this way can the obligation of educating the student in this fundamental be placed where it belongs, in the grade and high schools.

Our students are not less intelligent than European students, yet no European university finds it necessary to offer any courses *at all* in the grammar of the national tongue. The student's knowledge is adequate before he comes to the university. Our children can and must be taught their own language early in their schooling.

MARY ALICE MILLER

Fairbanks, Alaska

Social Security or Social Insanity?

The letter from K. M. Bridenstine, of Choteau, Montana, published in your December, 1957, issue has induced me to write my first letter to the JOURNAL.

Perhaps some of my brethren of the Bar may feel that I am using extravagant language in characterizing our existing social security system as social insanity. May I offer some personal evidence in support of my statement. I am an old fossil, past the age of 72 years, and, as a self-employed lawyer, was forced to come under the social security system at the beginning of 1956. I paid $126 social security tax on my 1956 income (3 per cent of $4,200) and $141.75 on my 1957 income (3⅜ per cent of $4,200). These payments "entitle" me and my wife to monthly benefits of $162.80 so long as we jointly live. I can continue working and there is no limit on my earnings except that imposed by my clients and continued social security taxes. My tax payments have gone into the general funds of the Treasury and in lieu thereof the Government has substituted a like amount of its own bonds in the so-called reserve fund. My posterity will have to pay the interest on these bonds and will have to redeem them at maturity. Therefore, by taking the benefits now available I will merely be drawing future drafts on the earnings of my grandchildren and possibly my great-grandchildren. This is social insanity.

By what process of tortured reasoning do the politicos arrive at the conclusion that those of us who are self-employed and who have been fortunate enough to give employment to others require the assistance of a paternalistic government to provide for us in our old age!

True, I do not have to accept the so-called "monthly benefits"—at least, not at the present time. Wisdom probably dictates acceptance thereof for the purpose of creating a trust fund for my grandchildren, thereby enabling them to redeem the governmental "IOU's".

Social Security was not discovered by the New Dealers. It is an instinct planted in man by Deity and is desirable.

Mr. Bridenstine was quite correct, in my opinion, in saying that there is no constitutional basis for compulsory social security. My concept of constitutional liberty and responsibility is that I have not relinquished my right to live within my means, to make provision for my own old age and to be free and independent of bureaucratic "do-goodism".

When our profession fails in its duty to uphold the constitutional rights of individuals, we have not added luster to our reputation as defenders of liberty.

WILLIAM E. RUSSELL

New York, New York

No Enlisted Men as Court-Martial Counsel

In reply to the letter of Mr. Herman Semel, as published in the January issue of the JOURNAL, I challenge the wisdom of the suggestion made by Mr. Semel that enlisted attorneys would provide a solution to the problem of the special court martial in the Armed Forces.

As an officer member of the Judge Advocate General's Corps, I have had considerable experience with the problems of a special court martial.

I agree with Mr. Semel in his conclusion that unskilled trial counsel and courts are often hopelessly bogged down in the ever-increasing complications of a military trial.

However, the fact that a person is admitted to the practice before the Bar of a state of the Union does not qualify him to act as defense or trial counsel in a military trial.

As each day passes, the Court of Military Appeals brings forth new rulings, which require new procedures and applications of the law before military courts. As a result, in order to be qualified to practice before a military court, it is necessary that the counsel be more or less on a full-time basis.

It is also important to note that due to recent developments, the president of the special court is required to assume greater responsibility in the administration of the trial.

It is therefore becoming more and

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more apparent that the special court martial procedure will necessarily have to be overhauled and eventually the position of president of the court being replaced by a legally trained and qualified person in a position of a judge and legally trained and qualified persons being required in the position of defense and trial counsel.

The Judge Advocate General is now working on a plan to provide a court martial unit somewhat similar to a circuit court to be utilized for general courts. It is expected that some variation of this plan could also be utilized for special courts.

A thorough overhaul of the special court martial is required. However, I do not think that Mr. Semel's recommendation offers more than a stop-gap solution.

May I also congratulate the Board of Editors on the very attractive new cover layout on the January issue of the JOURNAL?

ARTHUR T. JONES
Glendale, California

A Faulty Regulation— Or Just Negligently Drawn?

I wish to call to your attention a proposed regulation to Section 165 (c) of the 1954 Internal Revenue Code, pertaining to certain deductible losses.

The regulation, which was proposed on July 3, 1956, and numbered, 1.165-3, is in my opinion partly ambiguous. Paragraph 2 of this proposed regulation (1.165-3(2) reads as follows:

> A loss occasioned by damage to an automobile maintained for pleasure, where such damage results from the faulty driving of the taxpayer or other person operating the automobile, but is not due to the willful act or negligence of the taxpayer, is a deductible loss in the computation of taxable income. If damage to a taxpayer's automobile results from the faulty driving of the operator of an automobile with which the automobile of the taxpayer collides, the loss occasioned to the taxpayer by such damage is likewise deductible.

This paragraph must be interpreted to mean that if the taxpayer drives *negligently* and causes damage to his pleasure automobile, he will not be allowed a deduction for the loss incurred; whereas, if the taxpayer's damage to his pleasure automobile is caused by his *faulty* driving, he will be allowed a deduction for the loss incurred. What is the difference between fault and negligence? There may very well be a technical distinction between these two terms, but it seems to be a nebulous one for tax deduction purposes. The difference between a willful act and faulty driving is apparent, but the difference between negligence and fault is not so apparent. Leading authorities on the law of negligence are constantly stating that there is very little difference, if any, between negligence and fault.

This regulation should be clarified before its final adoption.

LESTER B. SNYDER
University of Connecticut
Hartford, Connecticut

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DEPRECIATION METHOD ON OLDER BUILDINGS OFFERS TAX ADVANTAGE

A corporation bought a prime office building that was several years old and called in Marshall and Stevens to discuss the application of appraisal techniques, to determine the best applicable legitimate depreciation procedures. By appraisal of various component parts which made up the structure, a series of basic figures was established and depreciation applied separately to each. In this manner more rapid depreciation proved allowable on certain less durable components, and the resulting write-off in this instance will amount to about 70% in the first half of the building's estimated remaining life. This application of the services of a recognized appraisal firm can result in tangible, immediate tax advantages in many cases.

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The Task and the Vision:

The Future Belongs to Free Men

by the Right Honorable Viscount Hailsham, Q.C. • *Lord President of the Council*

The Fellows of the American Bar Foundation heard an eloquent and stirring address at their banquet in Atlanta on Washington's Birthday. Lord Hailsham predicted that the Communist power will in the end destroy itself, and he looked forward to a bright future for all the world, saying that the basis for a world of peace and justice and freedom was the Anglo-American Alliance.

Every generation or so there have been born into the English-speaking world a few men who have carried their influence beyond their borders. Chatham, George Washington, Thomas Jefferson, Gladstone, and, though I say it in Atlanta, Lincoln, Field Marshal Smuts, Franklin Roosevelt, and, though perhaps it would become me better to voice my thought in my own country, Winston Churchill.

In the great hush, or rather the confused murmur of sound which has succeeded the retirement of Winston Churchill, the English-speaking world has awaited anxiously the true note of authentic leadership.

But the great throne of undisputed moral authority is vacant. None of us is of a size to mount its huge steps, and, in the interregnum, it behoves us all to speak as we may to comfort our fellows from our heart.

This I say by way of preface lest I should be thought, in offering my own testimony on a great theme, to be unaware of my own limitations or to overestimate my right to offer it.

Yet there is one thing which emboldens me to speak on this to me intensely moving occasion. Last year, our two countries were thinking of their past. I came over to Virginia at the head of what I believe and hope was rightly called a good will mission as the representative and, as it turned out, the precursor of my Sovereign to celebrate at Jamestown the three hundred and fiftieth anniversary of the first permanent settlement of the British in America.

On your side, you of the American Bar Association came to London to be the guests of the English legal profession, to claim, as it were, your own inheritance.

I hope you realized what an intense pride and pleasure it was for us to entertain you in London then. This pride and this pleasure were not due only, and I would not say primarily, to the hospitable satisfaction we felt in the company of so many distinguished guests from across the Atlantic. It was that you, recognizing origins of the doctrines, political and legal, which you no less than we hold sacred, the pursuit of freedom under the law—in your country no less than ours the true aim of society—came back to honor the small, the almost insignificant, shrines where these doctrines originated in their modern form, the green meadow beside the Thames at Runnymede, the now empty hall of William Rufus at Westminster, the four Inns of Court, the Houses of Parliament.

I think both nations learned a lesson from these ceremonies. We learned, what as the child of an American mother I had already known, that there is no libel on the United States of America more dangerous to believe than that they are a mushroom growth, a society without roots. For we knew as we welcomed you that in a real sense we were not the hosts nor you the guests. By right of space and inheritance we are the guardians of our historic places, but you, no less than we, are the heirs of them and of the spiritual inheritance of which they are the outward and visible sign. You came not merely to do us honor but to acknowledge and claim your own inheritance.

The English Bible is yours, the common law is yours, Shakespeare and Milton, representative institutions, Magna Charta all yours no less than ours.

But in your turn I hope you learned something of us. You learned, I hope, that it is a false travesty to regard Britain as an outworn society, fossilized

in tradition, and living solely on her past, a cross between a museum and an old curiosity shop. You were greeted by a virile, democratic, industrial people, a branch no less vigorous than you of the common stock of Western Christendom, a nuclear power, an industrial nation, the heart and inspiration of a world-wide society of free peoples.

For the doctrine of freedom under the law, in which we both believe, is a living not a dead tradition. It goes back through the centuries to Athens, Rome and Jerusalem but it carries forward into the future and keeps those who hold it young.

So as it was appropriate last year to celebrate the past, let this occasion be dedicated to the present and the future, the joint future of the British and American peoples to defend and carry forward the inheritance of which we are the joint heirs.

For in my turn, I come not only as your guest, but to claim an inheritance by right of birth of which I have always been proud but which I have hitherto scarcely known. Six generations of my forebears at least inhabited the American continent before my mother came to Britain. Two were officers in the Revolutionary Army, one a state governor, at least three were judges, and one at the age of seventeen fought in the Confederate Army in the War Between the States, and I can assure you that I am as proud of this birthright as I am loyal to the country of my birth. Thus to me friendship of our two peoples is more than a conviction. It is a cause, a covenant of the lease on which I hold the grant of life.

But I feel we are sometimes tempted to forget that this inheritance of freedom under the law shared by our two peoples and by all the nations of the Christian West is a heritage of the spirit. I do not underestimate the importance of military defense. But military defense is not enough. If we fail, no doubt we shall suffer military defeat. But if we fail it will not be because we have first suffered a military defeat. It will be because first the spirit has failed—or rather because we have failed the spirit, for the spirit never fails.

In this age the affairs of men are approaching a great climacteric, and the battle is for the soul of man rather than his body. We shall not win the battle unless we recognize this fact and put it first. Am I wrong in detecting a certain faltering, a certain confusion of the spirit both amongst us and you in the last two years? Then let us strengthen one another by our common convictions. Let us renew our faith in the fundamentals of our system, the validity of our standards, the efficacy of our philosophy of freedom. It is the confession of failure to rely solely on armaments and nuclear projects though I am the last to minimize their importance.

But the sword of the spirit is more powerful than the nuclear bomb. The greatest advantage of the West is not our nuclear power, though I have no doubt that if it came to that, Western scientists if they work together can outstrip the East. Our greatest advantage lies in the fact that however they may decry dollar diplomacy or British colonialism, all men know everywhere that in America and the British Commonwealth men are free and ruled by law, while in Russia and China and her satellites none are free, and none from Khrushchev and Chou En Lai to the lowest Chinese peasant on the Yellow River are immune to the capricious tyranny of despotic rule which is the very antithesis of law.

So I would also say, embrace the challenge of co-existence. Ours is the stronger system and will survive. It is as possible to overestimate the purely military danger as it is to neglect it altogether. The doctrine of Communism is political, and throughout their history, while not averse to the use of military force wherever they feel certain of success, the Communist authorities have preferred political means. It may be that in this circumstance lies one of the best hopes for the future of mankind.

One of the most persistent of Communist doctrines is that we are devoted to the system they know as capitalism which, say they, will inevitably destroy itself by virtue of its own contradictions. It may be that no one, not even a Communist, will risk the continued existence of his own society in order to secure the destruction of something he regards as doomed without his intervention. There is a sense in which the doctrine is even true. All human societies possess their own inner contradictions. You have them and we have them. But so have the Communists. And if these contradictions are not resolved, sooner or later they do result in the destruction of a society. All human societies are condemned to change, ours no less than theirs.

But the difference between our society and theirs is that ours, unlike the Communist, has built into its very structure a self-adjusting mechanism, dependent on Parliament and law courts, Congress and ballot box for the resolution of these very contradictions without resort to violence. It is the very presence of this mechanism which is the secret of our success as well as the essence of our freedom.

But, by the like token, it is the very absence of this self-adjusting mechanism, and even the fatal refusal by the Communist doctrinaires to recognize the existence of contradictions within the very marrow of their body politic, that leads to the constant repetition of self-destructive convulsions which shake their whole system every five or six years. Yet the contradictions exist and are perpetually unresolved. Let me name but two or three.

And first I must refer to the total incapacity of Communist theory to recognize the power of nationality and religion within the fabric of the Communist philosophy. Yet both exist and are eternally at war against the stability of the Communist State. The two institutions which have survived the Revolution are nationalism, seething beneath the surface from Azerbaijan to the Ukraine, and the Holy Orthodox Church. The refusal to recognize one or other of these contradictions has resulted in the successful revolt of Tito, the uneasy regime of Gomulka, the almost continuous but hidden persecution of the Jews, the revolts in Hungary and Eastern Germany. Experience

has shown that these tensions do not diminish with persecution, and though constantly repressed, they are continuously active and repeatedly erupt.

Next observe how a monolithic state of the Communist type is unable to ventilate genuine grievances and differences of opinion or policy. Since it is supposed that there is no clash of interest, or even genuine differences of class, it is believed that no differences of opinion may be honestly held. This means that there is no way out for an unsuccessful minority other than the death cell or exile preceded by humiliating and ridiculous confessions which no one believes but which it is death to doubt, and what is almost more pathetic, none for the successful leaders either but the perpetuation of the myth of the infallibility of a society which inevitably executes and execrates its most distinguished children as traitors to the regime. It is this contradiction which has resulted in the perpetual upheavals and treason trials, the purges and the deviations, the denunciations and persecutions which accompany every political and even some of the scientific controversies in the Soviet regime.

The third contradiction which I select for mention lies in the realm of education. It is necessary for the advance of Soviet science that its technologists and scientists acquire a great intellectual equipment and even enjoy a high measure of freedom in academic discussion. For such it becomes increasingly intolerable that their general reflection should be clamped down by Communist party doctrinaires. Hence the university population, the students, the scientists, the technologists are increasingly unconvinced by the fatuousness of Communist theory, but being essential to the regime cannot be liquidated or destroyed.

The conclusion of this part of my thesis is that, given an adequate protective military shield, it is our system which will survive, while the Communist power will in the end destroy itself and be brought to dust by the various discordant elements which its unyielding character will ultimately drive to despair. After ten years and more of Communism the young people of Hungary, some of whom have never known a state of liberty demonstrated that they would rather die under a Soviet tank than continue to live under Soviet masters. A society so hated will not be preserved by any number of dogs' coffins precipitated into the stratosphere and whirling around the planet.

I turn now to our own side, the free world. And here our object is perfectly plain. It is to create a society so good and so united in its belief in freedom that even the tyrants and slaves behind the Iron Curtain cannot hide from themselves the extent of its achievement.

I am convinced from the bottom of my heart that the basis for this society is the Anglo-American alliance. We must be on our guard against the danger of turning this, or seeming to want to turn it, for we could never succeed in such an endeavor, into an Anglo-American hegemony. This would cause nothing but resentment and disruption both in Europe and in the British Commonwealth. With our common language and our common legal and political assumptions we have, if anything, too much advantage as it is.

But none the less the Anglo-American alliance is the basis on which all else depends. Neither militarily, politically nor even economically can we or even you go it alone if our desire is genuinely to ensure that freedom triumphs over tyranny wherever it is found. It would be idle to pretend that there was no anti-Americanism in Britain in extreme circles of the left or right, just as it would be foolish to conceal the existence of Anglo-phobia in certain extreme circles here. But I am persuaded that he who is against Britain is no friend to America, and he who is against America is an enemy to the continued greatness and even survival of Britain. Yet the great thing is for both nations to realize that this alliance is no sentimental friendship, not a luxury, not even a common interest. It is a sacred duty, owed by both nations not only to one another and their fellow countrymen, but to our common humanity, to the free nations who can only be preserved by its continuance, to the oppressed nations whose only hopes are bound together with its prospects, to the developed nations whose future is challenged by the lawlessness of raw nationalism, to the undeveloped nations because only this alliance can offer them progress without chains.

Lord Hailsham who was Under Secretary of State for Air during World War II, rejoined the Conservative Government in 1956 as First Lord of the Admiralty. He became Minister of Education in Prime Minister Macmillan's Government in 1956, and then Deputy Leader of the House of Lords in 1957.

But now I may be somewhat bolder and look more speculatively into the future.

Judged by traditional standards there are only two absolute sovereignties in the world today, West and East, and that is manifestly more than the world can afford. There is no contemporary human society whose needs, economic, social, political, even military, do not transcend its national boundaries, but there is no adequate international machinery to match these needs. The East has an answer, but that answer is a conspiracy against human freedom. Has the West? Can the West produce a political idea less offensive than imperialism, less anarchic than the petty nationalism which has brought war and ruin wherever it has been tried—an idea not negative, but positive, an idea dynamic for peace which neither sacrifices justice nor provokes aggression?

I would answer, no, not if we statesmen are to be limited to the shorter term—the next appeal for talks, the next threat of aggression, the next financial crisis, the next demand from the next hysterical nationalist dictator. All these are to be dealt with in the short run, pragmatically, even platitudinously. But they do not lend that flash of inspiration and leadership.

But is the devil always to have the best tunes? Are we to ignore the light gilding the distant peaks because we have the responsibility of deciding the next day's march? Before I was a lawyer, I was a scholar. Because I have become a politician am I for that reason to become also a drudge?

And so your hospitality gives me the chance to look up for a change to the distant mountains of our search, and I will confess my vision that in the not far-distant future, mankind will live at peace enjoying liberty under the dominion of law. I see a world where freedom under the law is the rule and not the exception for mankind, for all mankind, I say, not just the West. In that world, the sums now spent on arms are devoted to education and research, to the elimination of disease, to the rescue of deserts from the sand, the mountains from erosion, and the plains from inundation, to the prevention of the physical decay of the planet, and of the pollution of its air and water, and to the enjoyment of the good things of life by the suffering millions of mankind. The nations of the world co-operate; frontiers are transcended and criss-crossed with functional organizations operating by international agreement. Citizenships, subject to necessary immigration laws, can be made interchangeable. If a citizen of Atlanta resides for a few months in London he finds himself voting for a member of Parliament; a British resident in Georgia or Tennessee is able to play a modest part in municipal affairs; a German in Paris or a Parisian in Dusseldorf is able to claim a voice in election of the mayor. Democratic forms dictate local customs and economic systems. My experience in my own country leads me to believe that the so-called democratic socialism, if by that is meant the national ownership of industry, is the exception and on the wane and the private organization of industry and commerce the almost universal rule; social democracy, if by that is meant the public organization of social services in a form agreeable to a system of full employment, is on the increase. Trade policies tend to be liberal, but that is because currencies have been made stable by an adequate international credit base; yet, with increasing wealth prices tend slowly to rise and so may yet remain the subject of critical complaints. Investment is the order of the day, and capital expenditure on power houses, communications, irrigation and fuel extraction are deliberately used on an international scale as economic stabilizers. The return on such investment is found more in the increased volume of international trade and a higher standard of life than in high rates of fixed interest. The United Nations acts as a clearing house for ideas, but, though the veto has been abolished, its absence is not much noticed, for thoughts of a super state imposing its will have receded with the danger of war. Disputes between states are dealt with by international organizations, but only juridical disputes are juridically determined. Because citizenship is largely interchangeable minorities can enjoy a dual citizenship and countries where there are two or more antagonistic communities are either internationally administered or first partitioned and then federated. There are few racial conflicts; the improvement in economic status and educational standards has got rid of some. The legal guarantee of minority rights has limited the scope for others. Less developed lands are following those more highly developed at such a pace that new racial tensions have hardly time to get going. Nationalities are the basis of most political organizations and the almost universal foundation of separate cultures, but no longer the excuse for aggression, the vehicle of tyranny, the pretext of lawlessness, or the basis of plunder.

You may say that such a picture is visionary. Well, so it is. I do not think it is the worse for that. I am under no illusions that in the world of the Sputnik and the hydrogen bomb, the massacre of Budapest, the eviction of the Dutch from Indonesia over some wretched dispute about territory, the Palestine refugees and *Apartheid*, the Algerian war, Cyprus and the dispute over the Suez Canal, such a picture seems remote from reality. But my point is that it is no further from reality than the Communist ideal, far less from reality than that vision of the New Jerusalem which has inspired the Christian Church for two thousand years; certainly not further from reality than that vision of a free and rational state of society which brought our ancestors, yours and mine, across the Atlantic little more than two hundred years ago, and made them build a settled society in an empty continent, and assert its independence, while yet maintaining its existing roots of law, language and religion. Let us not be ashamed of our dreams and visions, for it is by such things that the hearts and imaginations of uncommitted men and women the world over are captured. And if we of the West, unlike our Eastern rivals, demand no world dominion, we should not conceal from ourselves that we do desire to win over the hearts of all men everywhere to our own love of freedom and law. It is precisely this which renders us hateful to all tyrants. It is precisely this which renders our prosperity dangerous to their tyranny and makes us the target of their designs. Men can be persuaded to accept slavery as an alternative to starvation and death, but when men see freedom and prosperity as the real alternatives to their enslavement, no one would willingly be a slave.

But surely, you will say, all this is hypothetical. This was really the vision which animated the United States administration after the war. And it was brought to nothing by the intransigent implacable hostility of Communism. Czechoslovakia and Poland would have accepted Marshall Aid had they not been dragooned into a refusal. There are limits to the extent that the American and the British taxpayers can be made to go bail for the rest of humanity. We cannot neglect our defenses in order to lavish money on the uncommitted or the enslaved. Disarmament is all very well, but nuclear disarmament would place the

West at the mercy of Soviet supremacy in conventional weapons—a supremacy with which, the events of Hungary establish, the Communists are by no means to be trusted.

All this is true, and it is the explanation of much that seems unimaginative or negative in the approach of both the American and British Governments in international questions. But it would be wrong for you or for us to minimize the magnitude of our achievement to date.

I sincerely believe that but for the Anglo-American alliance Europe would be under Communist rule today; India and Pakistan might well have gone the way of China, had we not established the two Indian Commonwealth nations and had not British and American investment been available. Britain saved Greece from Communism in 1944. The Bagdad Pact and S.E.A.T.O. have limited the advances of Communism in the Near and Middle East. Despite the Algerian war, and their great hatred of Israel, neither the Arabs in particular, nor Islam in general, have accepted Communism. In the British Caribbean Federation, Burma, India and Pakistan, Ceylon, Malaya, Ghana and elsewhere in West Africa, multiracial Asian and African nations, both inside and outside the Commonwealth, are being fostered. In the east of Africa a different solution is being sought and has been rescued from Mau Mau and its equivalents. Japan has been set, I hope firmly and finally, on the Western democratic pattern.

These are the achievements of our own generation. We must not underestimate the extent to which, under the shield of our military defense, they can be made secure, and the world of our imagination come into being before even East-West tension is resolved. And as regards the East, let us experience neither illusion nor despair. There will be no peace in the world until we have overcome Communism. But the overcoming of Communism means superseding it as an idea in the minds and hearts of men and neither the destruction of Communists nor the military conquest of Communist dominated territories. Our physical weapons are for defense only. Our weapon of attack remains the sword of the spirit, the natural longing of men everywhere for freedom in place of oppression, for law in place of anarchy and despotism, for peace instead of an implacable hatred of mankind, for all three based on justice without which there can be neither freedom nor law nor peace among the cities of mankind.

I will conclude with a confession. I was brought up before 1914 to expect a world of comfort, privilege and ease. For over forty of my fifty years the world has been plunged in convulsion, bloodshed, suffering and fear. I have seen the houses of the city where I was born, homes in which I dwelt, or dined or slept, destroyed by high explosive bombs. I have seen my country deserted by all but a very few of her friends, confronted and derided by triumphant enemies. I will tell you that at the height of the last war while I did not contemplate defeat, still less surrender, there were times when I thought of the possibility of destruction. At such times I always said to myself, if we go down, there is always America. There are the free nations of the Commonwealth. If we go down, they will still survive, impregnable, and imperishable with the things they stand for, which are the things we fight for and will have died for. But though many perished, many of the best of us, our nations have survived. Now are we, who have lived on, rescued from so many and great dangers, to lose the prize for which we have striven, and so many others have suffered and fallen, from want of faith and steadfastness in the very cause for which they fell, and for which, as I believe, we have been preserved? I do not believe it. We shall be given, if we seek it, grace sufficient for our need. Nor are we, who have seen over the years of our pilgrimage so great and manifest a deliverance, destined for want of courage and vision to go down in ruin in a welter of small men and mean expedients.

The President's Page

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follow-up of "Law Day—U.S.A." must be to re-examine, re-evaluate and refurbish where necessary our triple-layer governmental structure, local, state and national, so that it will both maintain the respect of our people and meet their needs in the jet-space-atomic era.

From its inception to the present zenith of its power, our governmental system under law has been largely formulated, created and operated by lawyers. Now that this system is arrayed against its most powerful enemy in all history, we lawyers must be constant in our effort to inventory continually its strength and weakness so as to insure its integrity and its capacity to meet the needs of our people, today and tomorrow, in our role as leader of the free world.

In freedom's survival and expansion lies the hope of mankind. The rule of law offers the best way to achieve and maintain that great objective. We must make every day "Law Day" until all men can live in freedom and peace throughout the world.

Lawyer Referral Service and the British Legal Aid and Advice Act

by Theodore Voorhees • *of the Pennsylvania Bar (Philadelphia)*

The British Legal Aid and Advice Act is an attempt to do what the American Bar is trying to do with Legal Aid and Lawyer Referral Services —provide legal assistance for all citizens regardless of their ability to pay. And, although the effort has taken a different form in the United Kingdom, Mr. Voorhees points out that a comparison of our system with that of the British is, at least from the point of view of the individual lawyer, not at all entirely in our favor—in spite of the frequent assertions that the British plan is "socializing the legal profession".

The meeting of the American Bar Association in London provided a fitting place for the taking of a far-off and objective look at the development of the Association's Lawyer Referral Service program during the last decade. On our side of the Atlantic during that period, the number of services had expanded to cover ninety-eight of our principal cities as against twenty-eight in 1947 and to provide in 1956, legal advice for close to fifty thousand persons of moderate means.[1] Fees are paid, in theory at least, by all clients who seek the benefit of the plan, but since they are based upon the ability of the client to pay, in many instances the amount is quite small.

In England, during that same decade, an experiment of a very different sort has been inaugurated for the purpose of providing legal assistance to persons of small means. The Legal Aid and Advice Act was passed by Parliament in 1949[2] and in the brief intervening period it appears to have become a permanent part of the British administration of justice. The Act made provision for government subsidy of legal fees of two sorts, those paid in connection with litigated cases[3] and those for mere advice.[4] While as hereinafter shown, a very substantial number of litigants have gained assistance from the Government under Part I of the Act,[5] Section 7 of the Act which provides for Legal Advice has not yet been placed in operation.[6]

Since the last war, both in England and America, there has been an increasing awareness of the necessity of broadening the clientele of the legal profession so that everyone in need of legal services would be able to secure them. There as here, the complexities of modern life made it imperative that rich and poor and those who are neither the one nor the other should receive advice whenever the occasion for it arises and, there as here, the challenge to the Bar was manifested primarily in connection with the need of persons in the lower income groups. One great barrier which the public has never been able to overcome has been the unwillingness of lawyers to join with the membership of most of the other professions and to give the public a sensible idea of what it will be charged for an initial consultation.

In England, the first step toward opening the doors of our profession to a broader clientele was taken by Parliament, though the legislation undoubtedly owed much of its shaping to the Law Society which proposed a comprehensive scheme. In America, no act has yet been passed by Congress or any of the state legislatures to broaden the availability of legal services[7] and such steps as have been taken have stemmed from charity, in the form of the Legal Aid Society, or from

1. Report of the American Bar Association Committee on Lawyer Referral Service for 1957.

2. Halsbury's STATUTES OF ENGLAND, 2d. ed., Continuation volume: 1949 Statutes, 12 and 13 Geo. 6 c. 51.

3. Section 1 of the Act.

4. Section 7 of the Act.

5. During the six-year period ending in 1956, 102,666 assisted persons were successful in their litigations; 11,632 were unsuccessful. SIXTH REPORT OF THE LAW SOCIETY ON THE OPERATION AND FINANCE OF PART I OF THE LEGAL AID AND ADVICE ACT, 1949 (1957), page 49.

6. Section 7 of the Act contemplated that the Law Society would set up legal clinics which would provide advice either free or for a relatively nominal fee. The Law Society has urged the Government in annual report after annual report that the provision for advice under the Act would reduce litigation and hence the over-all cost of the administration of the scheme. To date, however, the Government has turned a deaf ear to the Society's plea.

7. In California, and perhaps other states, bills have been introduced into the legislature for the purpose of setting up subsidized legal advice.

the organized Bar in the establishment of lawyer referral plans.[8]

In England the legal profession accepted the responsibility for operating the Legal Aid Scheme bearing in mind that failure on their part to do so might well have entailed the establishment of a "nationalized" legal service. They find it hard to understand why we should have any misgivings over a system which is controlled by the legal profession.

In America, however, in discussions leading up to a bar association's adoption of a lawyer referral service, American lawyers have referred again and again to the British experiment in "socialized legal advice" as a dangerous threat to the profession in our country. The late Justice Jackson gave the following warning in 1949:[9]

> Today any profession that neglects to put its own house in order may find it being dusted out by unappreciative and unfriendly hands.

While no one could state with assurance the part which the Legal Aid and Advice Act has played in spurring on our Lawyer Referral program, many of our associations which have set up the service would most likely be willing to acknowledge that "the British threat" has not been without considerable influence.

Parallel Efforts . . . After Ten Years

After ten years of social experimentation on both sides of the ocean, it is interesting to examine and compare the results of our somewhat parallel efforts. Is the English legislation in fact leading to socialism in the legal profession? Has the United States developed a satisfactory alternative method of insuring the availability of legal services to all in need of them? What influence is the British experiment likely to have on future developments in the United States?

Without attempting to make a detailed analysis of the British Legal Aid Plan, several similarities and differences between its operation and that of our lawyer referral plan are worth noting. Both are run by the profession. The Law Society has full responsibility for the whole English program, and in each of the twelve areas in which its operations are subdivided, committees of local lawyers not only decide whether an applicant should be offered assistance but also supervise the assistance provided under the terms of the Act. Similarly, in America, committees of the bar associations are in charge of all properly authorized referral services.

Again, in England as in America, the participation of lawyers in the plan is voluntary. Yet it is said that over 75 per cent of all British lawyers have joined their Legal Aid panels[10] and while no comparable American statistics are available, it is believed that there are not more than fifteen thousand lawyers on all the American panels and hence it is likely that they represent but 2 or 3 per cent of our Bar.[11] In its fiscal year of operation, 1956-1957, the British plan entertained 40,222 applications for assistance and 22,049 Civil Aid Certificates were issued.[12] In America it appears from reports received from the established referral services that of the 46,623 people who applied for referrals during the year 1956, 34,730, or three quarters of them, were actually referred.

The basic differences between the two plans arise from their underlying philosophies. The recipients of British "assistance" must qualify for it. To oversimplify the requirements, the applicant must be found to have less than £500 ($1400) of "disposable capital" and less than £750 ($2100) of annual income. Within that income bracket fall most employed persons in England below the skilled worker class, but it should be noted that the majority of the assisted persons have to contribute in varying amounts to the over-all cost of the litigation.[13] Thus, from our viewpoint, the whole British experiment seems to present a mere substitute for American Legal Aid; anyone in our country having the financial status which in England would qualify him for government assistance would obtain free services in any American county where a Legal Aid Society was in operation.[14] Thus, again to oversimplify, the British plan results in the payment of fees partly from the Government, partly from the clients, for legal services which in our country would be rendered without charge almost as a matter of course.[15]

The American lawyer referral service, on the other hand, is designed for people of moderate means who would appear to be in a higher economic bracket than the beneficiaries of the British plan though the difference in economic standards in the two countries prevents such a generalization from being entirely sound. The regulations made by Parliament confine the benefits of the British scheme to those in the low income brackets, whereas, on our side it may at least be said that no widespread efforts have ever been made by the referral services to deprive any one of a referral because of the fact that his income was too large.[16]

As a consequence of the elaborate machinery set up to prevent misuse of "assistance" funds, the cost of administration in England is very high in comparison to the total administrative expense of operating one hundred referral services in America. The 1957 Annual Report of the Council of the Law Society[17] shows administrative

8. Legal Aid, which is well established in nearly all the principal cities of this country, is currently serving approximately one half million people a year, more than ten times the number who seek the aid of bar associations through the referral plan.

9. 35 A.B.A.J. 979 (December, 1949).

10. Virtually every law office in England has at least one lawyer on a panel and only the "company lawyer" and those commanding very high fees abstain from participation. A large percentage of all "assisted persons" are clients who come to their solicitors in the ordinary way and are advised to apply for assistance because of their inability to pay the costs of litigation.

11. In Philadelphia, over 700 lawyers, representing 25 per cent of the active Bar, are on the panel of the Lawyer Reference Service. In most cities the size of the panel is very much smaller.

12. The Law Society, ANNUAL REPORT OF THE COUNCIL (1957), page 140.

13. Thus, of those who received assistance in the last fiscal year, 918 contributed under £10; 4,484 between £10 and £50; 5,564 between £50 and £100; 3,013 over £100. No contribution was made by 6,667. The Law Society, ANNUAL REPORT OF THE COUNCIL (1957) page 143.

14. Legal Aid in one form or another is now found in 283 American counties.

15. England has, of course, had the same tradition as America insofar as charitable legal advice for the poor has been concerned. Even after the adoption of the Legal Aid and Advice Act a number of privately operated and charitably endowed legal clinics have continued to provide free advice for the poor.

16. On occasion, individual lawyers have expressed the fear that the referral service would draw away "good clients" from their former attorneys. In the actual operation of the services, however, no instances of this kind have been reported.

17. At page 151.

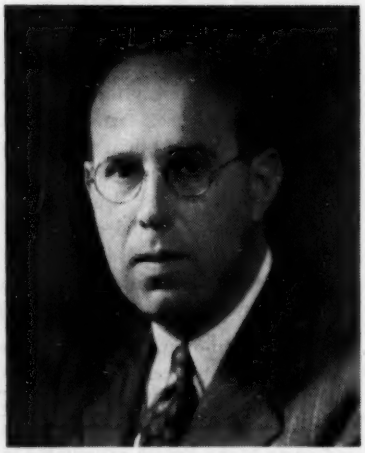
payments totaling £472,842 ($1,325,000), to which perhaps should be added £292,995 ($820,000) representing payments in connection with related matters handled by salaried solicitors on the staff of the Law Society. While no reliable American statistics are available, it is extremely doubtful that the administration expense of our 100 referral services exceeds $200,000.[18] "Solicitors' charges and Counsel's fees" under the British plan amounted last year to £1,441,575 ($4,036,000) and this was almost covered by a grant from the government of £1,375,000.[19] During the applicable fiscal year approximately 23,000 cases were disposed of under the provisions of the Act[20] and the average amount per case paid to the solicitors and barristers who handled them for their fees and disbursements was approximately £65 ($182).[21] We are without reliable guide as to the average fee which the members of the Lawyer Referral panels derive from their referred cases but an average of $20 per case, which is probably on the high side, would indicate a total revenue to the Bar of only $600,000.[22] It is scarcely necessary to add that the entire remuneration of the American lawyers comes not from the government nor from charity but from the pockets of the clients themselves.

Britain, America . . . Some Broad Conclusions

The foregoing comparison leads to the following broad conclusions. The British have chosen to substitute subsidized legal services to the poor in place of what they formerly had and what we have firmly accepted in the United States, *i.e.*, charitable Legal Aid for those who cannot afford to pay fees. At present the British have in operation no program which assures the availability of legal aid (by which they mean financial assistance in litigation) for persons in the moderate, as opposed to the lower, income brackets. They have no program for legal advice whatever. Our referral service, so far as it goes, appears to be quite a step in advance. However, in view of the relatively small number of persons whom it has served, we are not provided with much basis for self-congratulation, and it is far too early to dismiss the British plan as a small subsidy of a limited section of the public, which it now in fact appears to be. While under its present Government, England is going through a period of retrenchment, there are many indications that the British program will broaden materially as the years go by.

It has previously been pointed out that the "advice" section of the 1949 Act has yet to be put in operation. Under its provisions "preventive legal advice" would be made available gratis to persons of small means, but the Government for reasons of economy has confined the operation of the scheme to assistance in litigated cases. Every year for the last five years the Law Society has urged that the advice provisions be placed in operation and it is not unlikely that as soon as funds become available, the scope of the legislation will be considerably enlarged.

It does not appear that the Act will be extended at the present time so as to permit persons in slightly higher income brackets to obtain its benefits, though it has been recognized that with the inflation which has occurred since 1949 the present qualification requirements are unduly low. The British are now giving consideration to a plan under which they will attempt to make legal advice available to persons in the middle income brackets along the lines employed in America through the lawyer referral service. The plan under consideration by the Law Society contemplates that the solicitors who are willing to participate will give all clients an initial half-hour interview for a charge of £1 ($2.80). Their present thinking, however, adopts a fundamentally different approach from that of the American referral service. As in the case of their Legal Aid scheme, which provides that nothing in its operation will interfere with the normal lawyer-client relationship, the prospective clients would not be referred to a particular attorney when they inquired at the Law Society or elsewhere for assistance. They would be shown lists of solicitors which would give, locality by locality, the names of lawyers who have agreed to provide advice at the £1 rate and they would be entitled to pick out their own lawyer from that list.[23] As previously stated, 75 per cent of all the



Theodore Voorhees was admitted to the Bar in 1929 and practices in Philadelphia. He was educated at St. Paul's School, Concord, New Hampshire; Harvard University (A.B., 1932); and University of Pennsylvania (LL.B., 1929). He was a member of the Committee on Lawyer Referral Service from 1952 to 1957, and served as Chairman from 1952 to 1954.

18. In Philadelphia, for example, the annual administrative cost of the Lawyer Reference Service has not exceeded $12,000 in any year of its ten years of existence. Each year the service collects fees totaling approximately $5,000 partly from the lawyers on the panel who are charged $5.00 apiece and partly from the clients of the service who are charged a registration fee of $1.00. Thus, the net cost to the Philadelphia Bar Association is normally around $5,000 per year. The expenses of most other services are considerably less.

19. THE 1957 ANNUAL REPORT OF THE COUNCIL, pages 150-151.

20. THE SIXTH ANNUAL REPORT OF THE LAW SOCIETY (1957) page 49.

21. This figure is the total fee paid to solicitors and barristers. The amount contributed by Parliament is £24, by assisted persons' contributions £15, and by moneys recovered under orders for costs from assisted persons' opponents £26.

22. It should, of course, be observed that the fees in England are entirely from litigated cases, whereas the vast majority of the fees from referred cases under our plan are for short consultations for advice only. It has been estimated that 75 per cent of all lawyer referral cases are disposed of in the first half hour interview.

Thus the comparison of average fees proves nothing more than that the British lawyers derive considerably greater remuneration out of the Legal Aid and Advice scheme than do the American lawyers from our referral plan.

23. It is interesting to note that in America, the Bar has generally insisted on rotation of all referrals among members of the panel and again and again the fear has been expressed that the bar association might show favoritism so that the best referrals would go to a favored few.

Despite the fact that many of the most distinguished lawyers in Britain are found on the Legal Aid panels, the absence of a system of rotation has not been found prejudicial to the success of their plan.

lawyers in England and Wales have gone on the panels of the Legal Aid scheme and it is anticipated that the same percentage would accept this new advice program. With such a backing from the profession and with the publicity which the plan would be likely to obtain from the public press, the possibilities of benefit to both the public and the lawyers are very great.[24]

Few Americans would have any doubt that such a program would be vastly superior to an expansion of the Legal Aid and Advice Act. It might be worth our while to give thought as to whether such a plan would not be healthy in the United States as well.

The Lawyer Referral Service has been unable to escape two limitations which have seriously checked the expansion of its service. In the first place, in the large communities where it is most needed, only a relatively small percentage of the Bar has participated and the service has not been able to obtain the public acceptance that it would have if a large majority of the Bar would participate as it does in England. Secondly, perhaps because of the first limitation, the plan has never been able to gain the publicity which is essential if people are to be expected to make use of it.

With strong leadership and an intensive educational effort, the Bar in this country might be persuaded to accept as a basic premise the idea that the public is entitled to be told exactly how much it will be charged for a brief legal consultation of fixed duration. Few lawyers collect substantial fees for a first interview running not more than a half hour, and a fixed fee would save embarrassment for lawyer as well as client. Many of the initial interviews would lead to further legal services and there is no reason to believe that the legal work thus entailed would be on a dangerously unremunerative basis.[25]

Subsidized Legal Aid . . . It Will Remain

If the legal profession in Britain does adopt a course which will bring legal advice to the general public for a moderate fee, there is a likelihood that the governmentally supported program will be expanded to provide for payment out of public funds to solicitors advising those who cannot themselves afford to pay the fee of £1. Subsidized legal aid is not without its opponents in the British Isles but they are mostly found among the lawyers and clients in the upper income brackets and they form a very small minority of the whole. Last summer at a London meeting of young lawyers under the auspices of the Junior Bar, those from Britain were quite enthusiastic about the Legal Aid and Advice Plan. They pointed out that the average young barrister makes little more than £500 ($1,400) or £600 ($1,680) during his first years of practice and he is glad to become a member of a panel and to augment his income as best he can. As these young men grow older, they are not likely to develop a desire to curtail the operation of the plan.

In 1958 in America, Legal Aid and Lawyer Referral Service appear well entrenched as our profession's answer to the insistence of the times that legal advice be made available to all members of the community. It is close to a certainty that 99 per cent of our Bar would unhesitatingly reject any suggestion that we introduce the British scheme or anything approaching it. Unfortunately, the ultimate decision will lie with the legislature, which is more closely attuned to the voice of the people. Again and again, social legislation has crept from England to the United States. The speed with which virtually all our states adopted Lord Campbell's Act may be cited as a familiar example. There is, furthermore, a growing awareness that unless the Bar is successful in organizing some system for providing defense counsel for the indigent charged with crime, the Public Defender system is bound to spread. Such a development might well spill over into civil law.

It is not predicted that the United States will succumb to the demand for subsidized legal advice with rapidity or that we will accept it at all. Unless we are prepared to state, however, that the welfare state is entirely on the wane, we should look at the British experiment with a healthy respect and renew our efforts to put our own house in order.

The Legal Aid Society is doing a magnificent job insofar as the very poor are concerned. The Lawyer Referral Program has made a promising start in connection with the needs of the much more numerous and demanding class, those with moderate means. But a start is not enough. The profession must re-examine the referral plan and try to find ways in which it can be strengthened and made more useful. Our ultimate goal must be to make sure that legal advice is in fact available to all: not only to the rich, not only to the poor, but also to all those who fall between.

24. At the same time it is hoped that Section 7 of the Act will be implemented so that those members of the public who cannot afford to pay £1 for legal advice will be able nevertheless to go to a solicitor whose fee of £1 would then be paid out of the moneys provided by Parliament.

25. It should be remembered that under our lawyer referral plan, the fixed fee of $5 covers only the first half-hour interview. All later services are subject to the usual system of fixing remuneration, i.e., the fees are worked out by agreement between attorney and client.

An Expanding Concept:

Jurisdiction over Non-Residents

by Benjamin Wham • *of the Illinois Bar (Chicago)*

We live in a world much different from that of the Victorian era when *Pennoyer* v. *Neff* was decided. In this article, Mr. Wham shows what a tremendous change has occurred in our legal concepts of what constitutes "due process" in obtaining *in personam* jurisdiction over citizens of another state. Although he draws no conclusions from his study of the question, Mr. Wham's article raises some fundamental constitutional issues.

The relatively static condition of law and practice in 1877 was illustrated by the decision that year in the case of *Pennoyer* v. *Neff*.[1] That case followed the rule that a judgment *in personam* required a court to have "power" over the person of the defendant and, accordingly, "presence" in the jurisdiction of the court was a prerequisite to a personal judgment. Surprisingly enough, Justice Holmes in 1917, perhaps for lack of better briefing as to changing conditions, said "The foundation of jurisdiction is physical power."[2]

However, this power or presence theory of jurisdiction which apparently sufficed in 1877 and possibly in 1917 could not withstand the pressure caused by the need to modernize the law in order to keep abreast of the times. By 1945 the population had greatly increased, giant business enterprises reached across state lines and covered the entire country, and the network of air lanes, high-speed highways, radio, television and telephones had shrunk the size of the United States and brought people and their activities much closer together.

After 1877 and prior to 1945 modernization of the law proceeded apace, much of it unnoticed since it was a continuous process and the genius of the law seeks ways of effecting such changes without appearing to do so. One minor expansion of service within a state was substitution of "abode service" under which a copy of the summons was left at defendant's usual place of abode. This was recognized as sufficient service to support a personal judgment against a resident. Some states accorded a similar effect to notice by publication and mail.[3] The Supreme Court of the United States upheld a personal judgment rendered by a Wyoming court against a defendant domiciled in Wyoming and served with summons in Colorado.[4]

In the effort to maintain the appearance of making no change, the courts evolved the theory of consent to service. Non-resident motorists were brought under this consent theory through the enactment of statutes by which they were said to appoint the Secretary of State for service of summons in actions arising from use of the highways. The danger to local residents from high speed motorists was the justification for such jurisdiction. Likewise the public interest in protecting local residents led to jurisdiction over those engaged in the sale of securities. "Doing business" was another theory evolved for the purpose of obtaining jurisdiction over foreign corporations.

The End of the Fiction . . . The International Shoe Case

The fictitious character of some of these methods of obtaining jurisdiction had been obvious for some time when, in 1945, in *International Shoe Co.* v. *Washington*,[5] the United States Supreme Court pierced this fiction of power, presence, consent, domicile and the like, placed the due process clause of the Fourteenth Amendment under a magnifying glass and found that the essential element of jurisdiction is "fairness", "fair play", "substantial justice".

The Court said that the presence theory begs the question and that consent is a pure fiction in most cases.

1. 95 U.S. 714.
2. *McDonald* v. *Mabee*, 243 U.S. 90, 91.
3. *Bickerdike* v. *Allen*, 157 Ill. 95 (1895).
4. *Milliken* v. *Meyer*, 311 U.S. 457 (1940).
5. 326 U.S. 310; see excellent article by G. W. Foster, Jr., *Personal Jurisdiction Based on Local Causes of Action*, 1956 Wis. Law Rev. 522.

Instead, the Court said, personal jurisdiction over non-resident individuals and foreign corporations rests upon the "contacts, ties or relations" between them and the state. Continuing, the Court said "due process" requires only that the defendants "have certain minimum contacts" with the state such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice". The Court explained that contacts are tested by the quality, not the number of activities. It added that "an estimate of the inconveniences" to the defendant in being tried in another state should be considered in determining the quality of the contact and so the fairness to the defendant.

As pointed out in the concurring opinion, this standard of fair play and substantial justice may be criticized for its vagueness; in fact we suggest this standard is about as general as "due process". Certainly a busy trial lawyer or counsellor who is called upon by a client with a summons issued by a court of another state and served upon him in his home state would need to know more than has been stated above in order to advise as to a proper course of action. And this would also be true if the problem were reversed and the question were in what forum to bring suit against a resident of another state.

We suggest that the facts in *International Shoe* seem scarcely to bear out the full scope of the opinion: the defendant was a foreign corporation; it employed about a dozen Washington residents regularly who sold the shoes to dealers in that state; the orders were forwarded to St. Louis, the home office, where they were accepted and the shoes shipped to the retailers in interstate commerce (this was the defense); over $30,000 in commissions was paid to the resident salesmen annually; the State of Washington brought suit to force payment to the state unemployment compensation fund; and service was made locally upon one of the defendant's salesmen and notice was sent by registered mail to the home office of the defendant.

The facts on which jurisdiction is based in this case appear to differ little from those cases where a foreign corporation is "doing business": a dozen resident salesmen were continuously present and soliciting in the state, their commissions were paid to them in the state and the shoes were shipped into and delivered in the state. Furthermore, the suit was by the state to force payments to the unemployment compensation fund.

Much the same may be said as to a later case, *Travelers Health Association* v. *Virginia*,[6] decided in 1950. This was an action by the State of Virginia under the "blue sky law" for a cease and desist order to prevent Travelers, a Nebraska corporation, from solicitations and sales of insurance in the state without a permit. Travelers was conducting an extensive state-wide campaign by mail and some of its policyholders also were making personal solicitations without charge. Service was made on Travelers by registered mail only. The State Corporation Commission enjoined the defendant from solicitation and sales until it obtained a permit.

Travelers goes beyond *International Shoe* in that service was entirely by mail. However, the remedy sought was merely an injunction from solicitations and sales within the state. And here again the plaintiff was the state.

A further extension was made in 1952 when the Supreme Court held that a state could exercise personal jurisdiction over a foreign corporation as to a cause of action unrelated to the corporation's activities in the forum, provided its other contacts with the forum were sufficient to justify trial there without offending the standard of fair play and substantial justice.[7]

Non-Resident Service . . . An Expanding Concept

Undaunted by the vagueness of the standards laid down in these cases, state legislatures and state courts have responded vigorously and are expanding their state court jurisdiction over non-residents in a variety of ways.

A number of states have statutes giving jurisdiction where individuals, partnerships or corporations engage in business activities or have business transactions within the state which do not necessarily amount to the doing of business within the state in the traditional sense.[8]

Benjamin Wham has practiced law in Chicago since 1920. A former President of the Illinois State Bar Association, he is the Illinois State Delegate in the House of Delegates of the American Bar Association and is a former Chairman of the Section of Corporation, Banking and Business Law. He served with the Infantry in the A.E.F. in World War I and was the winner of the 1935 Ross Essay Prize.

Maryland subjects foreign corporations to its jurisdiction in "any cause of action arising out of a contract made within this state or liability incurred for acts done within this state, whether or not such foreign corporation is doing or has done business in this state".[9] Vermont subjects to its jurisdiction any foreign corporation which "makes a contract with a resident of Vermont to be performed in whole or in part by either party in Vermont, or . . . commits a tort in whole or in part in Vermont against a resident of Vermont".[10] Pennsylvania bases jurisdiction on ownership of real estate as to torts arising therefrom.[11] The non-resident motorist statute is now almost universal, and Pennsylvania has a non-resident aviator statute.[12]

Effective January 1, 1956, an Illinois

6. 339 U.S. 647.
7. *Perkins* v. *Benguet Consol. Min. Co.*, 342 U.S. 437.
8. Ala. Code (1940) Title 7, §199 (1) (1953 Cum. Supp.); Ark. Stat. Ann. (1947) §27-340; Fla., F.S.A. §47.16; N.J., N.J.S.A. 34.15-55.1.
9. Md. Code (1951) Art. 23, §88 (d).
10. Vt. Stat. (1947) §1562.
11. Pennsylvania, 12 P.S. §331.
12. Pennsylvania, 2 P.S. §1410.

statute provides for service of summons upon any party outside the state; and, if upon a citizen or resident of Illinois, or upon a person "who has submitted to the jurisdiction of the courts of this state", such service shall have the force and effect of personal service within the state.[13] This provision is based in part on *Millikin* v. *Meyer*, referred to above, which holds that a state may subject its own residents to personal jurisdiction upon reasonable notice served outside the boundaries of the state. Comparable provisions may be found in California, Colorado and New York.[14]

The next section in the Illinois statute confines the "submission" by a non-resident to the jurisdiction of the courts of the state to the: (a) "transaction of any business within this state", (b) "commission of a tortious act within this state", (c) "ownership, use or possession of any real estate situated in this state", and (d) "contracting to insure any person, property or risk located within this state at the time of contracting".[15]

The greatest number of problems under the Illinois statute will no doubt arise in connection with what constitutes the "transaction of any business". Undoubtedly it does not require "doing business" so that a single transaction will probably be sufficient. The physical presence of both parties within the state at the time of the entry into a contract which is to be performed within the state would seem to involve a maximum of ties and contacts. Solicitation in the state by mail or other form of advertising plus delivery of the product in Illinois would probably support action against a non-resident. On the other hand, the mere mailing of an order for merchandise into the state would probably not subject the non-resident buyer to an action for the purchase price in the state for the additional reason that this would undoubtedly chill this type of business transaction.[16]

The Illinois Supreme Court has recently construed the statute with reference to the commission of a tortious act within the state. In *Nelson* v. *Miller* (1957),[17] an employee of the defendant who was a resident of Wisconsin delivered by truck certain appliances to the plaintiff in Illinois. At the request of the defendant's employee the plaintiff assisted in unloading the truck, and in the course of this operation the defendant's employee negligently pushed the appliances so as to sever one finger of plaintiff's right hand and injure another. Summons was served personally on the defendant in Wisconsin. The court held that this was valid service, that it was fair and reasonable in the circumstances, gave the defendant adequate notice and an adequate opportunity to appear and be heard in his defense, that the defendant had the minimum contacts, that this was a convenient forum, and the suit would not offend traditional notions of fair play and substantial justice.

Much remains to be said; the purpose of this brief statement is merely to call attention to developments in this area. It seems clear that the above and similar statutes will require case by case construction before their constitutional limits may be determined; and, as so often happens, when this end is in sight, another major change may occur.

13. Section 16, Civil Practice Act.
14. Cal. Code Civ. Proc. §417; Colo. Rules Civ. Proc., Rule 4(f); and N. Y. Civ. Pract. Act. §235.
15. Section 17 Civil Practice Act.
16. See Joint Committee comments following Sections 16 and 17 in Smith-Hurd Ill. Ann. Stat. See also excellent discussion. Cleary on Venue, Proc. and Jur., Jan. 1956, ILL. BAR JOUR. SUPP.
17. 11 Ill. 2d 378.
18. Among other developments since this paper was submitted to the JOURNAL, attention is called to the following: *McGee* v. *International Life Ins. Co.* (December 16, 1957), upheld judgment in California where process was served by registered mail at principal place of business in Texas. The contract of insurance gave "substantial connection" with California. See discussion of "the impact" of the *McGee* case in the March, 1958, RECORD 139 (The Association of the Bar of the City of New York).

Make Your Hotel Reservations Now!

The Eighty-First Annual Meeting of the American Bar Association will be held in Los Angeles, California, August 25-29, 1958.

Attention is called to the fact that many interesting and worthwhile events of the meeting will take place on Sunday, August 24, preceding the opening sessions of the Assembly and the House of Delegates on Monday, August 25.

Requests for hotel reservations should be addressed to the Reservation Department, American Bar Association, 1155 East Sixtieth Street, Chicago 37, Illinois, and should be accompanied by payment of the $10.00 registration for **each lawyer** for whom a reservation is requested. Be sure to indicate three choices of hotels, type of accommodations desired and by whom you will be accompanied. We must also have your definite date of arrival as well as probable departure. Sleeping accommodations are still available in the following hotels: Alexandria, Beverly Wilshire, Chancellor, Commodore, Hayward, Hollywood Plaza, Hollywood Roosevelt, Mayflower, New Clark, San Carlos, Savoy Plaza and Teris. Reservations will be confirmed as promptly as possible.

We Must Have Courage:

Law, National Security and Survival

by **H. Rowan Gaither, Jr.** • ***Chairman of the Trustees of the Ford Foundation***

In a grim and sober address before the meeting of the Fellows of the American Bar Foundation in Atlanta last February 23, Mr. Gaither called upon the legal profession to assume the leadership in the struggle for control of the world between the free nations and international Communism. We can win the cold war, Mr. Gaither declared, but it will require the vision and the courage of our ancestors, who founded the Republic.

The essence of my remarks can be stated in two simple premises. First, the security of the nation and the free world is in unprecedented peril. Second, the influence of the American Bar was never more necessary than now to meet this peril. In my judgment, these two facts are inseparable.

It is clear that there now has been joined the issue of the survival of freedom with justice, if not the issue of survival of civilization itself. It is our task as a nation carrying the burden of the free world's leadership to bring this issue to trial before the court of world opinion and to have it resolved only by peaceful means in favor of free men everywhere.

In a unique, historical sense the United States is the advocate that has the largest responsibility for preparation and trial of the case. The jurors of world opinion—our allies, the uncommitted nations and the subjugated peoples—are preparing to receive the evidence whether freedom and democracy will prevail or international Communism.

It would be a grave error to assume that all the jurors understand our way of life or share our faith in its munificences and potentialities, or accept the notion that it will fulfill for them their own aspirations. Their capacity to learn from the evidence that only freedom guarantees the progress of civilization may be impaired by the growing materialistic and military power of Communism, by the urgency of their desire for material improvement or by our own ineptness.

It would be equally grave for us, as the advocates in this trial, to assume that our adversary somehow will collapse during the course of the trial, or that his case will be fortuitously and utterly destroyed by new evidence.

Our case must be presented with consummate skill, wisdom, imagination —and with unassailable clarity. It must proceed expeditiously. The damages to freedom—already great in the world —mount daily; they may reach a point of irreparability. From the ultimate verdict that must come there will be no appeal. And on this verdict rests our destiny.

I have said our security is in unprecedented peril not because I believe a total nuclear war is imminent or inevitable — I DO NOT — but because there are mounting political, economic and social forces, strongly abetted by the *threat* of nuclear extinction, which can disintegrate the fabric and will of free nations and enslave mankind.

Survival depends upon all Americans. The trial will test all our instruments of government, our institutions, our processes; indeed the very principles and foundations of our society are at stake. The burden of survival rests with special weight upon the members of the legal profession. This is a fact we must not evade, even if we could, and cannot evade, even if we wished.

The legal profession historically has had vast influence in the nation's affairs. Now, more than ever before, the legal profession has a *responsibility* commensurate with that influence. The wisdom and skill with which it exerts its influence and the energy and skill with which it discharges its responsibility can be one of the decisive forces in the time of testing ahead.

It is in this perspective of the great trial that I should like to discuss the role of the Bar.

First, let us examine the position in which we find ourselves today as a nation.

I cannot of course comment upon the national security study in which I participated last summer and fall. But I will not pretend that my views

concerning the legal profession and legal research remain unaffected by that experience.

From unclassified and declassified information, as well as from the published findings of various official and non-governmental groups, some blunt facts of life must be apparent to us.

The peoples of the world have now hurtled beyond the threshold of the thermonuclear missile age. There is no turning back. Never in history has man succeeded in restoring to the lamp the genie he has released and we are not likely to accomplish this feat at this most critical stage.

New Weapons . . . To Destroy Civilization

There have been developed weapons and systems for the delivery of these weapons which in a matter of hours, ultimately even in minutes, can destroy nations and civilizations.

To come to this awesome conclusion one need only ponder the fact that a single B-52 today can deliver, on one mission, the explosive equivalent of all bombs dropped in World War II.

Today's 20-megaton thermonuclear bomb, already tested, is one million times more powerful than the largest conventional bomb of World War II, the 20-ton "block buster". And the recent military study of the Rockefeller Brothers Fund tells us there is no theoretical upper limit to the explosive power than can be built into these weapons.

We know that a 20-megaton bomb would kill and destroy everything within a radius of at least five miles, demolishing everything within an area of 80 square miles. The radioactive fallout would dangerously contaminate an area of 10,000 square miles.

By 1960, it has been estimated that 105 million Americans—60 per cent of the nation's projected population, two years from now—will be living in some 1160 target areas, that is, communities of 10,000 population or more. The total area of these 1160 communities is only 18,000 square miles. True, these are scattered communities and not concentrated in a single 18,000 square-mile patch. But it is estimated that a bomb of only one megaton yield would kill by blast, heat and fire about 70 per cent of the people in an area of thirteen square miles, depending upon their location in relation to ground zero. All surviving, unsheltered personnel in an area of 600 square miles would receive a lethal dosage of fallout within seven hours, depending upon winds.

Another way of examining the same threat is to recognize that a large, successful attack on only fifty of our most important metropolitan areas would bring under fire 40 per cent of our total population, 50 per cent of our key facilities and 60 per cent of our industry.

This scale of catastrophe is beyond human experience and defies human imagination.

There can be no doubt that when intercontinental missiles with thermonuclear warheads are operational, the United States and Soviet Russia will possess the power and the means to destroy each other.

We can be certain that our nation will never unleash the war of ultimate destruction. Therefore, the peril that I speak of is directed *against* us and not *by* us at another power.

But the peril does not reside exclusively or even necessarily in a nuclear catastrophe. The ultimate objective of international Communism is world domination, and the Soviet Union will pursue this objective ruthlessly and relentlessly, employing every possible political, economic, subversive and military stratagem and tactic.

For the free world the last decade has been a period of underestimation and overoptimism. Many have underestimated the growth and the technological, economic and political power of the Soviet Union. And many have underrated Russia's capacity to exploit for its own ends the world's turmoil, tension and tribulations. With unwarranted optimism and complacency, too many assumed that our superiority would go unchallenged, and that in it the United States and its friends would find a permanent security. This miscalculation and self-deception have been responsible for a dangerously enervating effect in our own country and have eroded—only temporarily, we hope—the confidence of our friends abroad.

We know now that the threat to freedom is global in scope and indefinite in duration. The peril demands of us the will and the effort, sustained over decades, to increase our total strengths: to preserve our ideological and spiritual standards, to retain — and where necessary regain — our technological and military superiority, and with insight and inspiration to protect and promote freedom everywhere.

I have no doubt of our capability to meet the threat. Nor do I doubt the will and willingness of the American people to employ their capabilities to these imperative ends if they understand the peril and what is required of them.

This is the sobering setting in which all decisions must be taken. The question for us as lawyers, it seems to me, is whether law and justice as we have known them in our tradition will be responsive to the threat and, in turn, a powerful force for its eradication. The late Chief Justice Vanderbilt of New Jersey noted that we live in an age in which the world is being made over, economically, socially and to a considerable degree intellectually.

> In such periods of revolution [said Mr. Justice Vanderbilt] the law as well as society changes rapidly, and this calls for far greater ability in the legal profession than in ordinary times when routine and precedent will suffice. It calls for men like Washington and Adams, Hamilton and Jefferson in statecraft, like Madison among constitution-makers, and Marshall among interpreters of the Constitution, like Kent and Story among judges and law teachers.

Yet, my friends and fellow lawyers, I must confess to you that unless we as lawyers perceive the full implications of the peril and accept unstintingly our responsibility, I see the possibility that the organized Bar may take itself too much for granted and miss the chance for the greatness that is required.

The Organized Bar . . . A Tradition of Leadership

In the matter of survival, the *attitude* of the American Bar is of greater im-

portance than many of us may care to acknowledge. Leadership in public affairs is our tradition and our inherited responsibility. At each critical juncture in our history great figures have risen to leadership; more often than not they have emerged from our profession. There is no aspect of American political, legislative, economic and social life where our touch is not significant or important. Our influence is pervasive. Our responsibility, then, is inescapable.

I am more confident than my earlier recital might have indicated that we as a nation can survive; but I am concerned with the *manner* in which we shall survive.

This has particular relevance to any research you undertake. It should go without saying that integrity is a touchstone of research — that the American Bar Foundation must be non-political, non-partisan and at all times objective in the selection of its research subjects and in the evaluation and publication of the results of the research. In the conduct of its research it must maintain always the highest standards, attracting to this research the most capable men and women.

But beyond this, in the selection of research subjects, the American Bar Foundation should give highest priority to those activities which will increase the inner or inherent strengths of the United States in a period of protracted crisis and to those research activities which bear on the important issues of the total world crisis. It must seek constantly to find ways by which the results of its research can be brought into the arena of professional and, more broadly speaking, public action.

What are some of the areas in which legal research, particularly if coupled with subsequent action, can be productive? I will not go into specific subjects, but I do suggest the following broad areas:

I. *The first cluster of research activities must be directed toward the improvement of legal education.*

Research is needed urgently into the scope, techniques and aims of legal education. This is imperative, so that lawyers of the future are trained not only in the skills of the profession but more broadly are trained as citizens to accept the responsibilities which as professional men and as citizens they must discharge intelligently.

When I refer to legal education, I mean as well *continuing education* for those whose essential educational experience is behind them. Given the pace of world events and the needs of our society, the demands upon the lawyer will be ever greater. Thus, it is as important for the lawyer to keep himself continuously updated as it is for the medical doctor to be aware of the changes and advances in *his* science and art.

This means, of course, that all the *institutions and facilities* of legal education and research must be strengthened to meet with increasing effectiveness the challenge of our time.

II. *The second cluster of research activities must be aimed at improving the effectiveness of the legal profession for both public and private service.*

Research is needed into the contribution of the Bar to public leadership. There are many aspects to this problem. Two needs come to mind: how to make it possible for younger lawyers to spend a part of their careers in public service, other than as a way for gathering additional background for private practice, and how to give increased attention to the role and status of the publicly employed lawyer.

Research is needed of an analytical or applied type to improve the ability of the legal profession to discharge all aspects of its responsibility to society—to the individual, to the business and commercial community, to government and to public service.

III. *A third cluster of research activities must be aimed at preserving and furthering our democratic principles and processes—at enhancing our internal strengths.*

Through its project on criminal justice, the American Bar Foundation has recognized the pressing need for research on the administration of justice. It is evident to all of us that crime, including of course juvenile delinquency, not only causes vast economic loss but, worse, wastes the most essential substance of mankind, man himself.

The administration of civil justice also demands and deserves research attention.

The functioning of government at all levels is a matter of vital concern to us as lawyers and citizens. Never has history demanded of a nation wiser policy formulation, more expeditious decision-making and a higher efficiency in the conduct of national and international affairs.

The crisis challenges the free world to prove the efficiency of democratic forms and processes and exposes weaknesses which surely cannot be condoned in a struggle for survival. The list of needed research activities is long.

High on this list is the entire vital area of federal-state-local relationships. A moment ago I spoke of the damage that can be visited upon us by thermonuclear bombs. Can we comprehend what we might do as a nation if we were threatened with this kind of destruction, say within twenty-four hours, if we did not comply with some outrageous demand?

What would happen to the moral fiber of our people under such a threat? To survive as a nation would take the greatest leadership and governmental efficiency in all its forms.

H. Rowan Gaither received his education at the University of California and was admitted to the California Bar in 1933. He practiced law for a number of years in San Francisco. He was President of the Ford Foundation from 1953 to 1956 and now makes his home in New York City.

The point for the lawyer to consider—in fact for *every* responsible citizen to consider—is how our society must be organized to cope with the problems of sheer survival and recuperation if such a catastrophic attack were unleashed.

If the effort is not made in advance, there is little chance of surviving as a nation *after* such an attack. The national will to survive in its present form conceivably might disintegrate in the face of a threat of this magnitude if the people do not know what to do.

This possibility—grim and awful as it is—requires me to say to you in all candor that the Bar must think and act on these problems, to the end that we may be freed from the sweeping generalizations which so often preclude rational discussion of this subject. Out of this can come greater national security.

IV. *A fourth cluster of research activities to concern the legal profession centers about international organization and the administration of international justice.*

This will call for thoughtful analysis by lawyers and legal scholars working with political scientists, governmental officials and others. There is no alternative to peace, and it is of overriding concern that men and nations create the arrangements for peaceful existence and intercourse, totally freed from the possibility of nuclear catastrophe. The complexity of the problem, at times the seeming futility of finding solutions, must challenge and not deter us.

This is but a partial list of the areas of research that should concern us as we ponder our role in today's world. You will suggest more.

The Foundation . . . A Significant Instrumentality

The American Bar Foundation will make its greatest contribution to the security of the United States if it identifies—and then explores with fearlessness—those problems, no matter how sensitive or complex, that are bound up with our future and the future of the free world. If it does so, it will be a most significant instrumentality through which we as lawyers discharge our responsibility to the nation.

George Washington knew the demands of responsibility. From his leadership we must draw the lesson of a vision and a courage we need now as much as Washington needed it in the first days of our nationhood. The Fathers of the Republic put aside their own interests to deal with dangers as great in their time as those that confront us today. The lesson is perfectly clear: whatever sacrifices are called for, we must willingly make.

This is a time for the Bar again to offer to the people as a whole the special role of leadership it has offered in so many other moments of danger.

Justice Vanderbilt, whom I quoted earlier, summons us out of his writings to observe that "there never was a time when unselfish and enlightened leadership, in both public and private affairs, was more in demand".

I like to apply this, as indeed Mr. Vanderbilt did himself, to the American Bar. And to it I couple an observation of William James which each of us of the Bar must regard as a personal as well as a professional challenge. In its broadest aspect, William James called us all to be prepared for "that *lonely* kind of courage, *civic courage*".

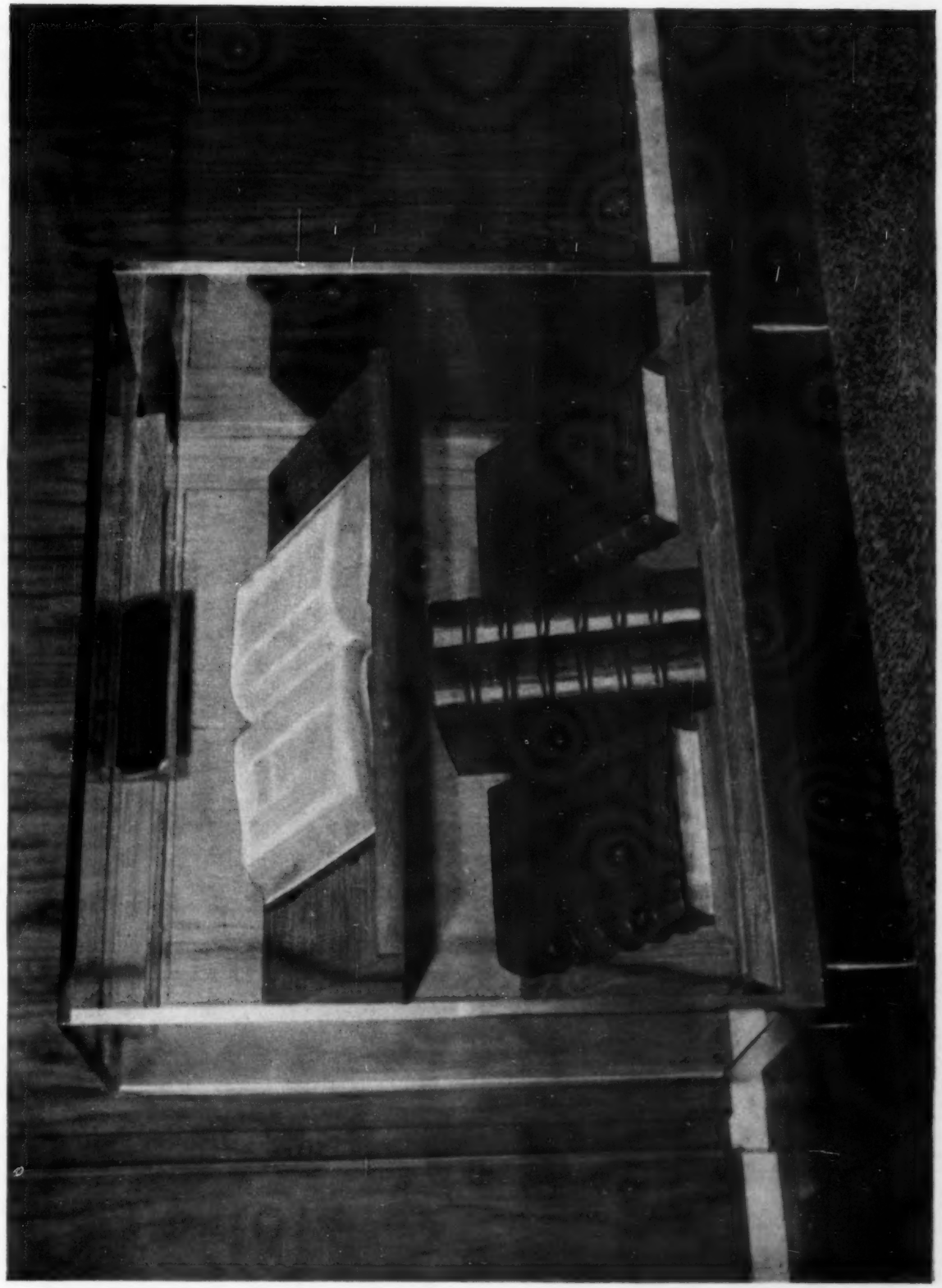
Only with such a manifestation of courage do we have the right to hope that we will preserve for ourselves and our children a nation of law, of security, and the basic principle that makes survival itself important and worth the struggle—the freedom of man.

Manuscripts for the *Journal*

■ The JOURNAL is glad to receive from its readers any manuscript, material or suggestions of items for publication. With our limited space, we can publish only a few of those submitted, but every article we receive is considered carefully by members of the Board of Editors. Articles in excess of 3000 words, including footnotes, cannot ordinarily be published.

Manuscripts submitted must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes and any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet these requirements.

Manuscripts are submitted at the sender's risk, and the Board assumes no responsibility for the return of material. Material accepted for publication becomes the property of the American Bar Association. No compensation is made for articles published and no article will be considered which has been accepted or published by any other publication.



Corpus Juris Civilis

This was presented to the American Bar Foundation in 1957 by the West Publishing Company.

Association Receives Rare Books as Gift of West Publishing Company

An exceptionally rare and valuable publication has recently been received by the American Bar Foundation from the West Publishing Company and is now beautifully housed in the Board of Governor's Room at the American Bar Center.[1]

Pictures of the gift appear in this issue.

The books are printed in Latin and bear the publication date of 1575. Only two other sets are known to be in existence today, one in the Library of Congress in Washington; the other in France.

Corpus Juris Civilis consists of five large volumes; the first is known as *Codex*, the second, third and fourth volumes as the *Pandects* and the fifth as the *Institutes*.

Tribonian, the purported author of the five volumes was the famous jurist and minister of Justinian, born in Pamphylia in the latter part of the fifth century. Adopting the profession of an advocate, he came to Constantinople and practiced in the prefectural courts there, reaching such eminence as to attract the notice of the Emperor Justinian, who appointed him in 528 one of the ten commissioners directed to prepare the first Codex of imperial constitutions. In the edict creating this commission (known as *Haec quae*), Tribonian is named sixth and is called *virum magnificum, magisteria dignitate inter agentes decoratum* (see *Haec quae* and *Summa reipublicae*, prefixed to the *Codex*).

When the commission of sixteen lawyers was created in 530 for the far more laborious and difficult duty of compiling a collection of extracts from the writings of the great jurists of the earlier empire, Tribonian was made president and no doubt general director of this board. He had already been raised to the office of quaestor, which at that time was a sort of ministry of law and justice, its holder being the assessor of the emperor and his organ for judicial purposes, something like the British lord chancellor of the later middle ages. The instructions given to these sixteen commissioners may be found in the constitution *Deo auctore* (Cod. i. 17, 1), and the method in which the work was dealt with in the constitution *Tanta* (Cod. i. 17, 2), great praise being awarded to Tribonian, who is therein called *exquaestor* and *ex-consul*, and also *magister officorum*.

This last constitution was issued in December, 533, when the *Digest* was promulgated as a law-book. During the progress of the work, in January, 532, there broke out in Constantinople a disturbance in the Hippodrome which speedily turned to a terrible insurrection, that which goes in history by the name of *Nika*, the watchword of the insurgents. Tribonian was accused of having prostituted his office for the purposes of gain, and the mob searched for him to put him to death (Procop. *Pers.* i. 24-26). Justinian, yielding for the moment, removed him from office, and appointed a certain Basilides in his place.

After the suppression of the insurrection the work of codification was resumed. A little earlier than the publication of the *Digest*, or *Pandects*, there had been published another but much smaller law-book, the *Institutes*, prepared under Justinian's orders by Tribonian, with Theophilus and Dorotheus, professors of law. Thus were the three units of this great work, the most influential legal work in the Western World, brought to completion.[2]

Despite the exceptionally fine material and workmanship evidenced in the original bindings, the nearly four hundred years saw serious deterioration take place.

Because the books are printed on fine parchment, the pages themselves were in remarkably fine condition. The donor felt that ordinary rebinding would not do justice to this unusual work and set out to have each volume completely restored.

This was done in the plant of The R. R. Donnelley and Sons Company under the direction of Harold W. Tribolet, one of the nation's leading authorities in the book restoration field.

The inserts on pages 429 and 463 of this issue, which are detachable and suitable for framing, were furnished to the JOURNAL by the West Publishing Company.

1. This set, a detachable picture of which is reproduced in this issue, was discovered in Amsterdam, Holland, in 1920 and became the property of the West Publishing Company.
2. Based upon a detailed article in the *Encyclopaedia Britannica* and used with the permission of the publishers.

In the four months required for the work, every page of every volume was examined. If any page showed signs of serious disintegration a very thin transparent tissue was applied, providing great strength without obscuring the text.

All loose leaves were resewn in the original style and new hemp cords were added to the backbones and secured to the leaves. New head bands were provided similar to those originally on the volumes.

The books were then fastened between marine mahogany boards, specially treated to resist dampness, and secured with the hemp cords.

Specially tanned calfskin was used for the final cover material and was stained and finished to provide a true replica of the original. Hand tooling of the bindings was created to reproduce the decoration which appeared on the original covers.

It was the custom in the sixteenth century to provide fasteners for closing large books. Brass and leather hooks were fabricated and brass receptacles were provided to receive the hooks.

When all of this restoration was completed each volume was placed in a gas chamber and subjected to a vapor from thymol crystals. This vapor gives protection to the paper against the growth of mildew.

But restoration of the books is only a part of the story. To properly house these rare and now beautiful volumes in the magnificent setting that the Board of Governor's Room at the American Bar Center provides was a real challenge.

To meet it the donor commissioned an artist-draftsman, Mr. William F. Zeckel of Chicago's Woodworker Corporation, to design a cabinet in keeping with the elegance of the room in which it was to be placed.

The result is a cabinet, the frame of which is built of architectural bronze to completely enclose the plate glass which forms the top, front and sides.

The interior, including the bottom of the display areas, is a rich natural finish hand-rubbed teakwood matching the walls of the room.

It is believed that in this gift the American Bar Center has in its possession a priceless publication of unusual historical significance and one that will increase in interest with the years.

Color pictures of the Association's copy of *Corpus Juris Civilis* have been inserted in this issue in a form suitable for framing.

Nominating Petitions

Arkansas

The undersigned hereby nominate John M. Lofton, of Little Rock, for the office of State Delegate for and from Arkansas to be elected in 1958 for a three-year term beginning at the adjournment of the 1958 Annual Meeting:

Clayton Little and William H. Enfield, of Bentonville;

James R. Hale, W. B. Putman, Suzanne C. Lighton and Carlos B. Hill, of Fayetteville;

Ralph M. Sloan, James W. Gallman, Walter G. Riddick, Jr., Wallace Townsend, T. S. Lovett, Jr., P. A. Lasley, Steele Hays, William H. Donham, Gaines Houston, Frank H. Cox, John C. Dugan, Brooks Bradley, Walls Trimble and Bruce T. Bullion, of Little Rock;

Claude M. Williams, Jr. and Claude Duty, of Rogers;

Arthur L. Smith, of Siloam Springs;

Ulys. A. Lovell and James E. Evans, of Springdale.

New York

The undersigned hereby nominate Milton Seaman, of New York City, for the office of State Delegate for and from New York to be elected in 1958 for a three-year term beginning at the adjournment of the 1958 Annual Meeting:

Hamilton O. Hale, Henry I. Stimson, Osborne A. McKegney, James E. Bennett, Jr., Edwin Longcope, George Yamaoka, Francis Y. Sogi, Melvin J. Koch, Daniel Huttenbrauck, Martin J. Dever, Marshall J. Deutsch, William R. Burt, Harold H. Hammer, Stuart B. Glover, Samuel M. Chapin, Monroe Chapin, Edward J. Grenier, John V. Shute, Paul B. Lynch, Sidney A. Diamond, Edward T. Burns, Donald H. Balleisen, Eugene J. Kaplan, Edward A. Fogel and Kalman I. Nulman, of New York.

Rhode Island

The undersigned hereby nominate Henry C. Hart, of Providence, for the office of State Delegate for and from Rhode Island to be elected in 1958 for a three-year term beginning at the adjournment of the 1958 Annual Meeting:

Eldridge H. Henning, Jr., of Cranston;

Robert F. Pickard, of East Greenwich;

Richard B. Sheffield, of Newport;

William R. Goldberg, William M. Mackenzie, J. Russell Blease, Francis R. Foley, John F. Quinn and J. Clifden O'Reilly, of Pawtucket;

George C. Davis, Harold B. Tanner, Colin MacR. Makepeace, Harold A. Andrews, Ellis L. Yatman, William A. Graham, Fred A. Otis, Henry M. Boss, Stuart H. Tucker, Lee A. Worrell, Bancroft Littlefield, John P. Cooney, Jr., Frank L. Hinckley, Hayward T. Parsons, Matthew W. Goring and Frank L. Hinckley, Jr., of Providence.

The Fifth Amendment:

Its Use in Congressional Investigations

by Raymond Coward • *Lieutenant Colonel, Judge Advocate General's Corps, U.S. Army*

The use of the privilege against self-incrimination by witnesses before congressional committees continues to be a source of news and controversy. In the past few months, a parade of officers of labor unions invoking the privilege during an inquiry into alleged misappropriation of union funds again gave rise to the argument that the amendment is outmoded and should be either altered or abolished to meet the conditions of the present day. Colonel Coward re-examines the history and the development of the privilege and concludes that it is one of the fundamental safeguards of our Bill of Rights.

A. General

Inquiries by congressional committees in recent weeks, particularly the Select Committee on Improper Activities in the Labor or Management Field of the United States Senate, have made the Fifth Amendment to the United States Constitution the subject of headlines and front page stories across the land. It is not too difficult to find proponents of the view that the use of the Fifth Amendment today before congressional committees is not in accordance with its original purpose. There are those who will ask, if the witness isn't guilty of any wrongdoing why does he invoke the privilege of the Fifth Amendment and refuse to answer questions? What is the extent to which the privilege may be invoked?

The divergent views expressed on these and related questions have prompted the writer into research in an effort to find the answer to some of the questions involved. Public debate is one of the great institutions of our country, and any move to curtail it might well be considered to be a step toward a dictatorship. If this discussion stimulates individual thinking about these matters the purpose of the writer will have been accomplished.

Now before going into a discussion of the historical development and some of the legal concepts concerning the Fifth Amendment and its use, it is desired to raise a few questions for individual reflection. It is not proposed to give an immediate answer to each question as it is raised, but perhaps the later discussion will be of assistance in helping the reader to arrive at his individual answers to questions concerning the importance of the Fifth Amendment in modern society.

What was the original purpose of the Fifth Amendment? Is the Fifth Amendment obsolete, outmoded and incapable of meeting the needs of modern society? Has the use of the privilege of the Fifth Amendment been abused during investigations by congressional committees in recent times? Should the Fifth Amendment be changed? If it is to be changed, what standards or safeguards to protect the rights of the individual should be substituted? Are there any conceivable situations where the interest of the Government should outweigh the right of the individual to invoke the Fifth Amendment? What does the Fifth Amendment mean to you as an American citizen?

B. Introduction

The recent inquiries by the Committees of Congress and developments resulting therefrom have given the public just grounds to pause and reflect on the Fifth Amendment and its purposes.

In this discussion we shall be primarily concerned with these words in the Fifth Amendment to the Constitution of the United States: "*No person . . . shall be compelled in any criminal case to be a witness against himself. . . .*"[1] [Italics added].

The privilege against self-incrimination is included not only in the Federal Constitution but also in those of forty-six states.[2] The Constitutions of Iowa and New Jersey do not contain the privilege, but it is nevertheless available even in those states.[3]

1. Constitution of the United States, Amendment V.
2. See Comment, *The Privilege Against Self-Incrimination and the Scope of Statutory Immunity*, 41 YALE L. J. 618 and Note 3 (1932).
3. *State* v. *Height*, 117 Iowa 650, 91 N.W. 935 (1902) (due process); *People* v. *Zdanowicz*, 69 N. J. L. 619 55 Atl. 743 (Ct. Err. & App. 1903) (common law).

C. Historical Development

Historians can trace the origin of the privilege back to the twelfth century when it was used in controversies between the King and bishops. Apparently the bishops sought to examine people about a wide variety of alleged offenses and the King sought to limit the bishops to ecclesiastical subjects. By the sixteenth century the idea had been reduced to a Latin maxim, *Nemo tenetur prodere se ipsum*, "No one should be required to accuse himself". However, in that period the maxim was little more than an idea as apparently it was standard practice to make suspected persons give evidence against themselves. Even torture was used as an element of persuasion to be sure the accused would speak. In following the development of the privilege we should keep in mind its close connection with the struggle to eliminate torture of the accused as a governmental practice.

Dean Erwin N. Griswold of the Harvard Law School has stated that we owe the privilege of today primarily to "Freeborn John" Lilburne, "a cantankerous person". In 1637 he was haled before the Star Chamber on a charge of having imported seditious books. He refused to take the oath to answer truly and was condemned to be whipped and pilloried. About 1641 Parliament decided that the sentence was illegal and ordered £3,000 paid to him as an indemnity.[4]

This case apparently established the privilege against self-incrimination as part of the common law in England. In the latter half of the seventeenth century the privilege was recognized on many occasions by the English courts and it is still so recognized today. During the eighteenth century little is heard about self-incrimination and this may be because the privilege was generally recognized in the American colonies after it became established as part of the common law of England.

The privilege was included in the Virginia Bill of Rights of 1776 drafted by George Mason and perhaps because of this the privilege appeared in various forms in six or seven of the original states. When the United States Constitution was ratified some of the states proposed amendments including reference to the privilege against self-incrimination. Accordingly, the privilege was included in proposals made by Congress which became the Fifth Amendment in 1791 and it remains unchanged to this day. Its importance to protect the rights of the individual from the collective power of the state is still recognized in our system of government.

In *Brown* v. *Walker*,[5] Mr. Justice Stephen J. Field of the United States Supreme Court stated:

> The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to everyone, and needs no illustration. [He continued, saying that the privilege is the] result of the long struggle between the opposing forces of the spirit of individual liberty on the one hand and the collective power of the state on the other.

The privilege against self-incrimination extends to matters of a person's opinion or political views which may be elements in a charge against him and such a charge may be very difficult to prove by evidence from sources other than the accused himself. However, the privilege is broader than that and is applicable even in the most sordid crime.

One might ask whether we go too far in giving this protection to criminals. Isn't the claim of the privilege evidence of the guilt of the witness? We should never overlook the fact that one of the purposes of the Fifth Amendment was to protect the innocent.

Why should a man fear he will incriminate himself if he knows he has committed no crime?

Consider, however, a case where a man killed another in self-defense, or by accident, without intending to commit a crime. The mere admission of the fact that he killed him may well incriminate the accused. He will then have the burden of proof to establish his own innocence. Thus we might well remember that the privilege against self-incrimination is a companion of the recognized rule that a person is innocent until proved guilty.

In *Burdick* v. *United States*,[6] Mr. Justice McKenna stated:

> If it be objected that the sensitiveness of Burdick was extreme because his refusal to answer was itself an implication of crime, we answer, not necessarily in fact, not at all in theory of law.

D. Power of Congress To Investigate

The Constitution confers no explicit authority upon Congress, or either House, to conduct investigations, and consequently their powers in this regard are derived solely by inference. The purpose of investigations by Congress is to enable it to carry out its responsibilities under the Constitution. It must seek information from those best qualified to furnish it. Investigations normally result either in recommendations to legislate or in a finding that no legislation is necessary. Accordingly, they are generally regarded as within the legislative function.[7]

The first formal investigation by Congress occurred in 1792 and concerned the failure of a military expedition.[8] Since that time the number of congressional investigations has run into the thousands.

Some twenty-five years before Woodrow Wilson became President, he wrote:

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function.[9]

4. THE 5TH AMENDMENT TODAY, by Erwin N. Griswold, page 3.
5. 161 U. S. 591, 637 (1896).
6. 236 U. S. 79 (1915).
7. *United States* v. *Bryan*, 72 F. Supp. 58, 61 (D. C. 1947), revd. on other grounds, 174 F. 2d 525 (D. C. Cir. 1949), revd., 330 U.S. 323 (1950).
8. 40 VA. L. REV. 876 (1954).
9. Wilson, CONGRESSIONAL GOVERNMENT 303 (1885).

An important governmental doctrine is the separation of powers. The legislative branch has its responsibilities but so do the executive and judicial branches of the government. All are sworn to uphold the Constitution.

Mr. Justice Stone once said: "Courts are not the only agency of government that must be assumed to have capacity to govern."[10]

When an investigation is being conducted the power that is being exercised is the power of the House or the Senate. This is true whether the investigation is being conducted by a full committee, a subcommittee, or even a subcommittee of one. No subcommittee has any power to investigate except on a delegation of the power delegated by the House or the Senate to the committee.

E. Scope of Lawful Inquiry

The case of *Anderson* v. *Dunn*,[11] which reached the Supreme Court in 1821, did not involve an investigation but for the first time dealt with the crucial power of the House of Representatives to punish for contempt, consisting of attempted bribery of a member. The alleged briber was tried by the House and was found guilty, reprimanded and discharged after being held in custody for eight days. He sued for false imprisonment and contended: (1) the lack of express constitutional authority, especially in a single House; (2) violation of the principle of the separation of powers; (3) what may be called the *expressio unius* argument, based upon the express powers of the two houses; and (4) the limitation of the Fourth and Fifth Amendments.

The Court rejected all these arguments and decided that Congress had a right and duty to maintain the powers which are implied from those expressly granted, and a duty to the people who are its creators. The Court rejected suggestions that the power of the House to punish for contempt should be limited to contempts committed in its presence, restrained within any geographical limits, or confined to a particular type of contempt. The only limitation indicated was that the punishment should be limited by the life of the House imposing it. This limitation was later extended by the Act of 1857[12] to a fine of not more than $1,000 and imprisonment for not over twelve months.

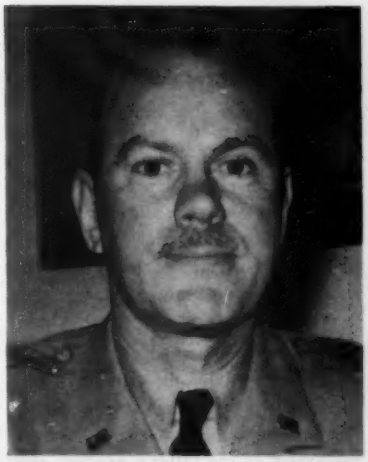
It appears that this old limitation may still exist in contempt proceedings before the House.[13] However, such proceedings have largely been superseded in recent years by indictments under the Act of 1857 as amended.[14] It would not seem permissible to apply the old doctrine to proceedings before the Senate, which is a continuing body.[15] The doctrine of this case continued for half a century until for the first time a case directly involving a congressional investigation came before the Supreme Court.[16]

The case of *Kilbourn* v. *Thompson*[17] has been both acclaimed and criticized. Funds of the United States had been deposited with Jay Cooke & Company, which had become bankrupt and whose trustee had made an improvident settlement with the United States. This firm had been connected with a certain "real estate pool", which is not described, and the House passed a resolution directing a committee to investigate the character of the settlement and the "nature and history of the pool". Kilbourn, whose connection with the pool is not indicated, was summoned as a witness, but declined to produce records of the pool or to name its members. Brought before the House, he was confined to jail, but in a habeas corpus proceeding he was remitted to the custody of the United States Marshal. He sued the Sergeant at Arms for false imprisonment and the Supreme Court held that his imprisonment was not justified. The resolution contained no indication that the investigation was in anticipation of legislation. It was no more than an inquiry into the affairs of private citizens which the Court held was beyond the power of Congress. Kilbourn was discharged and later got a verdict for $20,000 which was paid out of an appropriation by Congress.[18]

In re Chapman,[19] decided some sixteen years later by the Supreme Court, concerned Chapman's refusal to answer questions of a Senate Committee investigating newspaper charges that some Senators had yielded to corrupt influences in considering certain pending legislation. He had been indicted and convicted under Sections 102 and 104 of the Revised Statutes (1878). The main point at issue was whether these statutes were constitutional. The Court upheld their constitutionality and stated:

> ... Congress possessed the constitutional power to enact a statute to enforce the attendance of witnesses and to compel them to make disclosure of evidence to enable the respective bodies to discharge their legitimate functions.

Marshall v. *Gordon*[20] concerned a direct proceeding by the House itself for contempt consisting of an insulting letter from Marshall to a subcommittee



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10. *United States* v. *Butler*, 297 U. S. 1, 87 (1936).
11. 6 Wheat. 204 (U. S. 1821).
12. 11 Stat. 155 (1857), Rev. Stat. §§ 102, 104 (1878), 2 U.S.C. 192, 194 (1952).
13. *Jurney* v. *MacCracken*, 294 U. S. 125 (1935).
14. *Supra*, note 12.
15. *McGrain* v. *Daugherty*, *infra*, note 21 at 150-152.
16. 40 Va. L. Rev. 878, 879 (1954).
17. 103 U. S. 168 (1881).
18. Eberling, Congressional Investigations 350 (1928).
19. 166 U. S. 661, 671 (1897).
20. 243 U. S. 521 (1917).

of the House. The House ordered Marshall's arrest. His petition for habeas corpus was denied by the district court but was granted by the Supreme Court, on the premise that the right of the House to punish rested solely on its right to prevent obstruction of its power to legislate. This decision supports the investigative power of Congress through its right to punish the recusant witness.

The leading case of *McGrain* v. *Daugherty*[21] concerned (1) an investigation ordered by the Senate in connection with the administration of the office of the Attorney General, and (2) the arrest of the latter's brother after he refused to appear before the Senate in that investigation to answer pertinent questions seeking information necessary as a basis for "legislation and other action". The witness was released on habeas corpus, but the Supreme Court reversed and laid down the doctrine that "the power of inquiry —with process to enforce it—is an essential and appropriate auxiliary to the legislative function".

It was suggested that the words "other action" might be other than legislation, but this was rejected by the Court and it held that the only legitimate purpose in ordering the investigation was to aid in legislation and implied that this purpose should be presumed. The doctrine of this case still stands and with this case the legal development of the scope of congressional inquiries came to its conclusion.

Judge Holtzoff has ruled that the investigative power is based entirely upon the congressional function of legislation and appropriation, and added:

> If the subject under scrutiny may have *any possible relevancy and materiality, no matter how remote, to some possible legislation*, it is within the power of Congress to investigate the matter. Moreover, the relevancy and the materiality of the subject matter must be presumed.[22] [Italics added].

Congress can investigate incident to its power to legislate,[23] even when the investigation extends to the Executive Branch of the Government.[24] Congress can also investigate incident to its power to impeach (*Kilbourn* v. *Thompson, supra*) and incident to its power to judge the elections and qualifications of its members[25]; and to its power to expel or censure its members.[26]

Sinclair v. *United States, supra*, held that the *Kilbourn* case's exemption from scrutiny of private and personal affairs did not relate to transactions in which public interests were involved (such as Tea Pot Dome oil reserves), and that inquiries as to these were not such a fishing expedition as was condemned in *FTC* v. *American Tobacco Co.*, 264 U. S. 298 (1924).

F. When Fifth Amendment May Be Properly Invoked

The invocation of the privilege must be based upon a reasonable apprehension or fear of prosecution. If it is not reasonable by objective legal standards the witness may be punished for contempt based on his refusal to answer pertinent questions. Further, the witness must be truthful in invoking the privilege.

Chief Justice John Marshall in the *Aaron Burr* case[27] stated:

> If the declaration [that the answer of the witness would incriminate him] be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath. . . .

The privilege may be asserted in any kind of proceedings, such as bankruptcy proceedings,[28] grand jury proceedings,[29] or in an immigration hearing.[30] It may likewise be used in congressional investigations.[31]

The privilege may be validly asserted if in the light of what the judge knows about the case, or from evidence presented by the witness, he finds that some possible answer might divulge incriminating facts or any information from which incriminating evidence might be obtained.[32] Courts consistently uphold the right to claim the privilege with respect to such questions as the association of the witness with the Communist Party,[33] his business[34] and acquaintances.[35] The privilege cannot be asserted when the witness desires to avoid civil liability,[36] personal disgrace[37] or prosecution by another sovereign, as when he invokes the privilege for fear of prosecution under the laws of a foreign country[38] or wishes to protect other persons.[39] The privilege may not be asserted by a corporation[40] or an impersonal association,[41] and an official of such a body cannot properly refuse to produce the organization's records even though they may tend to incriminate him personally.[42] The "impersonal association" test referred to above has been applied to the Communist Party.[43] Furthermore, records which are required to be kept by statute are not privileged.[44] The privilege may not be asserted in the federal courts to avoid incrimination under state law.[45] However, a few recent cases have rejected this rule and have held that the privilege can be asserted in federal courts if incrimination under state law is feared, at least when the federal authorities are investigating into state crimes.[46] A few states have held that the privilege can be asserted in state courts to avoid incrimination under federal law.[47] Query whether the privilege may properly be

(Continued on page 490)

21. 273 U. S. 135 at 174 (1927).
22. *United States* v. *Bryan, supra*, note 7.
23. *McGrain* v. *Daugherty, supra*, note 15 and 21; see *Kilbourn* v. *Thompson, supra*, note 17 at 193.
24. *Sinclair* v. *United States*, 279 U. S. 263 (1929).
25. *United States* v. *Norris*, 300 U. S. 564 (1937).
26. *In re Chapman*, supra. note 19.
27. *United States* v. *Aaron Burr, In re Willis*, 25 Fed. Cas. 38, 40 (C. C. D. Va. 1807).
28. *McCarthy* v. *Arndstein*, 266 U. S. 34 (1924).
29. *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892).
30. *Estes* v. *Potter*, 183 F. 2d 865 (5th Cir. 1950).
31. See discussion of *Quinn* case, *infra*, note 49.
32. *Kasinowitz* v. *United States*, 181 F. 2d 632 (9th Cir. 1950). See Falkner, *Self-Incrimination Privilege: "Links in the Chain"*, 5 VAND. L. REV. 479 (1952).
33. *Blau* v. *United States*, 340 U. S. 159 (1950).
34. *Hoffman* v. *United States*, 341 U. S. 479 (1951).
35. *Aiuppa* v. *United States*, 201 F. 2d 287 (6th Cir. 1952).
36. 8 Wigmore, EVIDENCE, §2254 (3d ed. 1940).
37. *Brown* v. *Walker, supra*, note 5 at 591, 605.
38. *Greece* v. *Konpouras*, 264 Mass. 318, 162 N. E. 345 (1928).
39. *Rogers* v. *United States*, 340 U. S. 367 (1951).
40. *Hale* v. *Henkel*, 201 U. S. 43 (1906).
41. *United States* v. *White*, 322 U. S. 694 (1944) (labor union).
42. *United States* v. *Fleischman*, 339 U. S. 349 (1950).
43. *Communist Party* v. *SACB*, No. 11850, D. C. Cir., December 23, 1954.
44. *Shapiro* v. *United States*, 335 U. S. 1 (1948); 68 HARV. L. REV. 340 (1954).
45. *United States* v. *Murdock*, 284 U. S. 141 (1931).
46. *United States* v. *Di-Carlo*, 102 F. Supp. 597 (N. D. Ohio 1952). See 66 HARV. L. REV. 186 (1952).
47. *State ex rel. Mitchell* v. *Kelly*, 71 So. 2d 887 (Fla. 1954); *People* v. *Den Uyl*, 318 Mich. 645, 29 N. W. 2d 284 (1947).

Union Racketeering:

The Responsibility of the Bar

by **John F. Kennedy** • ***United States Senator from Massachusetts***

Senator Kennedy recalls the words of Chief Justice Stone, delivered over twenty years ago, denouncing corporation lawyers who had forgotten their professional responsibilities in their zeal for their clients. There are a few union lawyers, the Senator says, against whom the same charge can be made, as the recent congressional investigations of labor union racketeering have revealed. Senator Kennedy calls upon the organized Bar to take action against the small minority of union counsel that are guilty of this sort of malpractice.

Almost a quarter of a century ago, Supreme Court Justice Harlan Fiske Stone, speaking at the dedication of the University of Michigan Law Quadrangle, delivered one of the most important addresses ever made in this country to a company of lawyers. His subject was the professional responsibility of the Bar, and needless to say, he did not consider the topic exhausted by a few well-chosen words on the evils of ambulance-chasing. His thrust was more far-reaching and basic—in essence an indictment of two generations of corporation lawyers.

The Bar, said Justice Stone, had been the servant of the country's mushrooming corporate growth in the gaudy twenties. It had placed the skills and technical proficiency of centuries of professional development at the command of the financial community. Some of these corporate and financial operators, not unsurprisingly, some of these clients of a generation ago were unscrupulous, dishonest, operating around the fringes of the law or seeking to bend it to fit their improper objectives. A large minority of these entrepreneurs and brokers were simply unaware of the duties and responsibilities that necessarily bind those dealing in other people's money—men who were not so much dishonest as they were misguided, imprudent, ineffective, reckless or irresponsible.

Whether the businessman client knew better or not, his lawyer always did or should have. Too often, Justice Stone thought, these lawyers forgot that they were members of a profession and all that that implies. Too many of them had surrendered the function of independent and critical judgment which has been the historic pride of the legal profession—a judgment that never spared and often guided the clients to be served. And as a result, said Stone, the nation's lawyers had to bear a large share of the responsibility for the chaos these harmful corporate activities had created by the beginning of the 1930's and for the always unwelcome effort to impose governmental regulation where private self-regulation had failed.

I have often thought of Justice Stone's appeal to the Bar as I sat during the past year through the grim and sometimes shocking hearings before the Senate Committee on Improper Practices in the Labor or Management Field, the McClellan Committee. Watching that parade of witnesses from the irresponsible fringe of the labor movement—some unscrupulous, some only misguided—and watching or hearing about their attorneys as well, it has seemed to me to present a striking parallel to the situation of which Justice Stone complained some twenty-four years ago.

For during the past two decades, organized labor has grown enormously in wealth, in strength and in numbers. It has been fostered and encouraged by federal and state laws. Its votes and support have been prizes eagerly sought by both political parties. We count on it to perform indispensable functions in the operation of our economy—to help spread the benefits of increased production among workers and their families by hard bargaining for wage increases and other benefits, to help keep the economy on an even keel by acting as a counterweight to big business.

The development of such economic power and the organization of such collective effort could not have been achieved—and was not achieved—without the active assistance of wise

and skillful lawyers. In fact, since the period of major union growth coincided with large-scale federal regulation of labor relations under the Wagner Act and the Taft-Hartley Act, high-grade legal advice and legal services were needed at every step of the way.

The legal profession as a whole has never been as thoroughly committed to the service of labor as, a generation ago, it was to business. Nevertheless, in the thirties and after, an increasing number of able law graduates were drawn to the growing labor movement by a sense of adventure and service. There was, I think, idealism and dedication in the election of many young men to "go into" the field of labor law—and properly so. It meant service to the many and not the few, to the cause of economic justice and a better way of life. For the overwhelming majority of those who have pursued distinguished careers in this field, this idealism has remained bright and untarnished to this day. Our committee has been greatly aided, for example, by the helpful co-operation and expert advice of the AFL-CIO's wise and honorable General Counsel, Arthur Goldberg, who deserves much of the credit for that group's precedent-shattering set of Ethical Practices Codes.

But there are others, I am afraid—too many others—to whom Justice Stone's strictures of almost a generation ago apply in full force today. "I venture to assert", he said, "that when the history of the financial era" (and for this *we* must substitute "era of union growth") "which has just drawn to a close comes to be written, most of its major mistakes and its major faults will be ascribed to the failure to observe the fiduciary principle, the precept as old as holy writ, that 'a man cannot serve two masters'. . . . There is little to suggest *that the Bar has yet recognized that it must bear some of the responsibility for these evils.* But when we know and face the facts, we should have to acknowledge that such departures from the fiduciary principle *do not usually occur without the active assistance of some member of our profession*; and that their increasing recurrence would have been impossible but for the complaisance of a Bar, too absorbed in the workaday care of private interests to take account of these events of profound import—or to sound the warning that the profession looks askance on these as things that 'are not done'."

Union Racketeers . . . A Long List

In the past year, our committee has held up to public and congressional view a long list of malpractices currently characterizing the small racketeering element in our trade union movement—practices which have again been in most instances the result of serving two masters, one's union and one's self; and practices which have again been made possible by the "active assistance" of some members of the Bar. As this sorry story unfolds, many of the lawyers appearing before our committee—as counsel or as witnesses—or whose names have otherwise been involved in the testimony, have brought shame to the name of an honorable profession.

Their ranks—those who engage in what might well be called legal racketeering—include the following:

(1) Lawyers who, working for a union official, arrange, conceal and worst of all share in the illicit profits of a variety of improper transactions that use union funds or power for private gain.

(2) Lawyers paid from union funds, to which all of the union's members have contributed, who appear before our committee or a court to advise the union's suspect officers against revealing the purposes for which those members' dues have been used, or otherwise to defend those officers against charges of stealing from or defrauding these same members that pay the lawyer's salary.

(3) Lawyers who represent management in the morning and so-called unions or union leaders in the afternoon, who draw up the "sweetheart" contracts that keep respectable unions out, keep wages low and keep the profits to both the employers and the fake union leaders very high indeed.

(4) Lawyers who organize "paper" locals, sham employer associations, so-called independent unions and fake health and welfare plans in order to promote the kind of collusion that costs responsible management and labor—as well as the general public—dearly.

(5) Lawyers who use their position with the union to promote their own financial interests, using union funds or union power to accomplish transactions and investments of benefit only to themselves.

These are but some of the examples that disturb me today—not because they reveal wrongdoing on the part of any more than a tiny minority of this honorable profession—but because of the Bar's apparent indifference to these revelations. Outside of New York City, where I understand a special committee of the Bar is examining the matter, I know of no action by any state Bar or other appropriate authority to institute proceedings against these individuals; and I know of no bar association reorienting its codes and canons of ethics to stamp out these practices—as the AFL-CIO itself has done to stamp out labor-racketeering. Where are the members of the Bar who will prove their title to professional leadership by taking the lead in seeking to remove this stain on the name of their calling? Where is the Justice Stone of today who will rise up to indict this corruption and complaisance, this deceit and dishonor?

There should be no delay because the wrongfulness of any of these tactics is in doubt. The Canons of Professional Ethics promulgated by the American Bar Association, as I understand them, make it unprofessional for a lawyer to "represent conflicting interests, except by express consent of all concerned, given after a full disclosure of all the facts" (Canon 6). Nor may an attorney forward his client's interest by unethical or illegal means. "The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane" (Canon 15). Moreover he has an express duty to attempt to restrain and prevent his clients' improprieties, including "doing those things which the lawyer himself ought not to do" (Canon 16).

A lawyer who is retained by a labor union is the *union's* representative. His client is not the union president or the officers or the members of the executive committee—his client is the *union.* He is paid with *union funds,* dues collected from the members—and it is to them as an organization that his true professional responsibility runs. That organization is something bigger and more important than the persons who temporarily hold office in it.

The officers, like the officers of a corporation, are themselves only the servants of the broader membership. They, too, are subject to fiduciary principles. They hold the funds of the union in trust, and must manage its affairs to serve not their private ends but the larger interests of the organization. How, then, can the union's lawyer take fees from the union treasury to defend its officers against the charge of embezzling from that same treasury?

Corporate Lawyers . . . Another Analogy

The parallel here to the corporate field is again perfectly plain. Officers and directors of companies are often called to account, by their shareholders, public officials or others, to defend their stewardship of the corporate funds in court. In such cases it is firmly established that the director or officer must pay for his own defense and that the same attorney that represents the company cannot, with propriety, represent the defending official. The few statutes which permit the official to reimburse himself out of corporate funds, if the suit against him proves groundless, regulate this right stringently. Certainly no less stringent conception of propriety should prevail in the union field.

I think it is thus demonstrable that the lawyer-client relationships revealed by our committee and which I have enumerated above violate the generally accepted ethical standards of the legal profession.

The question is why. What is in these two situations—involving corporate attorneys on one hand and union attorneys on the other—which demoralized these professional men, blunted their critical judgments and put them in conflict with the true interests they were supposed to represent? Watching them before the committee, I have concluded their fall from grace was not a sudden one but the result of a gradual erosion of their guide lines. I have come, I hope, to a better understanding of the problems, and the temptations and the relentless pressures which peculiarly beset the legal profession.

Unlike the doctor, engineer or architect, the lawyer always appears in a representative capacity. He takes on a kind of dual personality, and the undesirable characteristics of one may be merged in the other if firm resistance is not present. The lawyer is subject, moreover, to a constant and wearing pressure which does not afflict the other professions. He operates in a field of contention. In most instances, there is an adversary, striving to defeat or neutralize his every effort. Ever present is the demoralizing influence of the client, who is interested only in results, who scoffs at a first-rate professional effort unless it is completely successful, who is often more interested in whom you know than in what you know.

Unless the lawyer is continuously mindful of the proprieties, there is always danger that the stress of the situation will blur and make indistinguishable the ground rules. There is always the inducement of the disreputable practitioner who, because of alleged connections, claims he can guarantee a favorable result. This peddling of the names of reputable judges and public officials destroys public confidence in the entire judicial and executive systems and is an especially vicious form of character assassination.

There is another form of insidious infection which is peculiar to the legal profession. The lawyer exerting his best efforts on behalf of his client finds it easy to justify conduct which he would immediately recognize as improper if he were acting merely in his own behalf. This philosophy is particularly virulent because it can be made to appear as professional service and sacrifice beyond the call of duty.

There is, too, the bond of sympathy which often comes into existence between the lawyer and his client during their relationship. I suppose this is particularly true in the field of criminal law. While espousing and defending the criminal, a lawyer may unconsciously lower or lessen his abhorrence of the crime because of mitigating circumstances in the particular case.

John F. Kennedy was graduated from Harvard in 1940. He entered the Navy in 1941, serving during the war as commander of a PT boat. Elected to Congress in 1946, he served three terms in the House. He was elected to the Senate in 1952.

The public also conceives of the law as a sporting proposition and extends sympathy to the unfortunate, the underdog, the man trapped in the toils of the law. This strange but disturbing reality is manifested in a number of ways. This doctrine appears to provide most criminal case defendants with a license to perjure themselves in the effort to win acquittal. No wonder so many lawyers, young and old, dream of dramatically extricating some malefactor from the death house. Few of them envision the glory of increasing the prison population.

I do not maintain, however, that the labor racketeer lawyers to whom I have referred engaged in these kinds of practices because they were not aware of the unethical character of their acts. Nonetheless, I should hope for an effort parallel to that of the AFL-CIO in drafting Ethical Practices Codes, whereby members of the Bar would turn their attention to this par-

ticular area and try to develop more specific regulations governing the practice of their profession within it. This effort to formulate more specific codes of conduct is not useful because it results in any new discoveries of what is right and what is wrong, but because it focuses professional attention on the policing of the Bar, properly and traditionally the Bar's own professional responsibility.

The problem is not now, and it never has been, that all, or a majority, or even a very large minority, of labor lawyers have engaged in improper practices. But the fact that one has not personally profited from impropriety does not absolve him of responsibility for impropriety. For if the act of belonging to a profession is to have any special significance at all, it is at least in part that you become your brother's keeper on matters of professional conduct. The strength of our professions, and particularly the Bar, has been their ability to impose high standards of conduct not on their best elements—because that would be easy—but on their worst.

In the final analysis, this discipline is obtained not by grievance committees and disbarment proceedings, but by the weight of professional opinion—informed, organized, focused upon the areas in which departures from fiduciary principles are becoming "increasingly recurrent" on the part of both clients and their lawyers. Such a mobilization of professional opinion cannot prevent every instance of wrong-doing on the part of members of the Bar—be they labor lawyers or tax lawyers or corporation lawyers. There will always be some to whom the material rewards of wrong-doing will seem more attractive than their public reputations or the esteem of their colleagues. But professional opinion *can* prevent individual instances of impropriety from turning into an epidemic, the kind that Justice Stone saw in the corporate Bar twenty-five years ago, and the kind that must be eradicated before it spreads in the labor Bar today.

I leave that challenge in the hands of the legal profession to whom this article is addressed, trusting that it will never be necessary for the Congress or any other legislative body to police the ethics of the legal profession. And when the profession cleanses its ranks and restores itself to its true position of leadership in our society, then once again lawyers and non-lawyers alike will recall the eternal wisdom of Justice Stone's reminder that "the great figures of the law stir the imagination and inspire our reverence according as they have used their special training and gifts for the advancement of the public interest".

Views of Our Readers

(Continued from page 410)

"Withholding Justice" From the Indigent

In the December issue of the JOURNAL, Walter J. Klockaw, Jr., attacks the constitutional basis of *Griffin* v. *Illinois*, 351 U.S. 12 (1956), with extreme vigor and, fortunately, with great clarity. The objection which your contributor put forward was before the Court when it decided *Griffin* and is stated in the dissent of Mr. Justice Harlan. We have elsewhere attempted to answer this objection at some length [43 Cornell L. Q. 1, especially at pages 15-17 (1957)]. However, since the issue has been raised so succinctly in your columns, we think a brief reply is in order.

Mr. Klockaw maintained that the Court could not properly speak of a state's having "denied" or "withheld" a right of review to indigents when what the state did was to give *everyone* (who could pay for it) an appeal. To be sure, Illinois was not withholding review in the same sense it would have been had it expressly said that poor people could not appeal. But is there not a perfectly good sense of "withheld" or "denied" in which something is "withheld" or "denied" if the condition for obtaining it is impossible or unreasonable? Would not Mr. Klockaw be withholding the family car from his son if he told him that he might use it tonight for $100? Would not the editor of this JOURNAL be denying the right to reply to this letter if he told Mr. Klockaw that he might do so for $100?

Secondly, Mr. Klockaw asks why a state should have more obligation to pay the cost of justice than it does to pay the cost of food or transportation or education. He says, "If there are deserving people wholly without funds . . . the disability is a practical or natural one having no scintilla of significance in a constitutional sense". We leave it to the teachers of morals and politics to tell Mr. Klockaw he is wrong about the obligation of a state to provide food for the starving and medical care for the sick when they are unable to afford these themselves. As students of constitutional law, however, we can say that the issue of a state's obligation to provide hospitals and schools is of an entirely different order from the issue of a state's obligation to provide justice. There is a constitutional impropriety in conditioning the defense of a criminal action on the payment of a fee. And this is so even though there is no constitutional impropriety in conditioning education or medical services on the payment of a fee. The difference is that we cannot conceive of a man as truly a citizen if poverty shuts him out of court while we do conceive of him as a citizen even though he may be too poor to pay for his own medical care. From ancient times it has been the mark of a slave that he could not enter the courts—he was, so to speak, *without* the state. A state which does no more than to provide *all* its citizens with justice is not extending the role of government to novel social welfare fields but is only performing what even the most conservative political thinker would consider the most basic function of government.

BERTRAM F. WILLCOX
EDWARD J. BLOUSTEIN

Ithaca, New York

The Trade Court Proposal:

An Examination of Some Possible Defects

by Earl W. Kintner • *General Counsel of the Federal Trade Commission*

In 1955, the Hoover Commission Task Force on Legal Services and Procedures recommended the creation of a specialized trade court with jurisdiction similar to that now held by the Federal Trade Commission and the National Labor Relations Board. This proposal was approved by the Association's House of Delegates in 1956. Mr. Kintner believes that the proposal is unsound, and he sets forth his reasons in this article. By publishing Mr. Kintner's views, the JOURNAL, of course, is not sponsoring his position, which is contrary to that of the Association as expressed by the 1956 resolution set forth in footnote 1.

On February 20, 1956, the House of Delegates of the American Bar Association adopted Resolution 4 on Specialized Courts, recommending, among other things, that certain "judicial functions" of the Federal Trade Commission be transferred to a specialized court under the judicial branch of the Government.[1] This resolution was one of a number presented to the House of Delegates by a Special Committee on Legal Services and Procedure which had been appointed in May, 1955, to study the Reports on Legal Services and Procedure of the Hoover Commission[2] and of its Task Force,[3] as well as the Report of the President's Conference on Administrative Procedure.[4] Following the adoption of the resolutions, the Board of Governors authorized the Committee to appear before Congress in support of the principles involved and to participate in the drafting of pertinent legislation.

In August, 1956, the House of Delegates voted to continue the Committee on Legal Services and Procedure, and advisory groups have drafted legislation implementing the House Resolutions of February, 1956[5].

Resolution 4 contains, in substance, Recommendations Nos. 63 and 64 of the Hoover Commission Task Force on Legal Services and Procedure.[6] The section of the Task Force Report containing these two recommendations was "based primarily" on material contained in a single questionnaire sent to "the departments and independent establishments of the executive branch". The entire survey was done "in a period of 10 months with the assistance of only a few professional consultants and a small staff".[7] The questionnaire consisted of fourteen basic sections in the pattern of the Administrative Procedure Act of 1946.

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*The comments herein are not necessarily official views of the Federal Trade Commission.

1. Resolution 4 reads as follows:
"4. SPECIALIZED COURTS. RESOLVED, That the American Bar Association recommends to the Congress the establishment, by amendment of Title 28 of the United States Code, of one or more courts of special jurisdiction within and as part of the judicial branch of the Government, such courts to have original jurisdiction in specified cases to ensure the tradition of independence in areas presently subject to administrative action equivalent to judical action in courts of general jurisdiction, and their final orders and judgments to be subject to review by the Courts of Appeals; and that there be transferred to divisions of a single such court or to several such courts:
(a) Limited jurisdiction in the trade practice field with respect to certain powers now vested in the Federal Trade Commission and in certain other agencies.
(b) The jurisdiction now vested in the National Labor Relations Board over the adjudication of representation and unfair labor practice cases.
(c) Such other adjudicatory functions as the Congress may from time to time determine."
In a statement in the July, 1956, issue of this JOURNAL, Ashley Sellers, Chairman of the Association's Special Committee on Legal Services and Procedure, referred to this Resolution as calling for "the establishment of one or more new courts which will perform "*judicial functions* [my italics] now being performed by certain administrative agencies". *A New Legislative Program of the Association*, 42 A. B. A. J. 637 (1956).

2. Commission on Organization of the Executive Branch of the Government. Report on Legal Services and Procedure (1955). Sections of the Report relevant to this discussion are discussed in Harris, *The Hoover Commission Report: Improvement of Legal Services and Procedure*, 41 A.B.A.J. 713-717 (1955). Mr. Harris was Staff Director of the Commission's Task Force on Legal Services and Procedure.

3. Commission on Organization of the Executive Branch of the Government. Task Force Report on Legal Services and Procedure (1955).

4. Report, undated, of the Conference on Administrative Procedure, called by the President of the United States on April 29, 1953.

5. The action is noted in *Proceedings of the House of Delegates: 79th Annual Meeting, Dallas, Texas*, 42 A.B.A.J. 1051, 1053 (1956).

A special committee of the Bar Association of the District of Columbia made a study of the Hoover Commission proposals, and, although unanimously approving proposals for procedural improvement, recommended that the Association defer action on the Specialized Courts. The two-thirds majority report of the Committee cited as reasons for its recommendation to table the Specialized Court proposal: lack of information on considerations which prompted the American Bar Association's Special Committee to select two agencies out of nine mentioned in the Commission proposals for Specialized Court treatment; the lack of documentation for the Task Force recommendations; necessity of studying the 1910 Commerce Court shortcomings; alarm at the growing tendency toward specialized bars; and the possibility that other proposals for improvement of the administrative process would achieve the desired end short of the more drastic proposal for an administrative court.
The Committee's report was approved by the Association after spirited debate on the merits on September 29, 1956.

6. *Op. cit. supra*, note 3, at 246 and 250.

7. *Id.* at 3, 4.

The first thirteen sections requested statements of functions and procedures; the fourteenth section requested evalution and recommendations from the reporting agency itself.[8]

In the introduction to its report, the Task Force stated: "Problems encountered by the task force have arisen from factual analysis and not from preconception".[9] However, in my opinion, no amount of "analysis" of the data elicited in the questionnaire could warrant the Task Force recommendations, which are grounded, not in empirical evalution, but in theory.

Separation of Functions

The principal argument for the recommendation contained in Resolution 4, as it relates to the Federal Trade Commission, is that the Commission, in cease and desist order proceedings brought under the provisions of Section 5 of the Federal Trade Commission Act[10] and Section 11 of the Clayton Act,[11] acts as both prosecutor and judge in the same case.[12] Respondents appearing before the Commission, the argument goes, cannot receive a fair hearing, since the Commission (judge) is biased in favor of the Commission (prosecutor), and as Coke said in *The College of Physicians' Case (Dr. Bonham's Case)*, no man ought to be "judge in his own cause".[13]

This combination in one agency of the functions of alleging violations of law and deciding disputes over such allegations has troubled the legal profession since the creation of such agencies.[14] Reformers have presented several solutions alternative to simply grinning and bearing it.

One possibility is to separate, within the agency itself, the function of deciding from the function of alleging and proving law violations. The National Labor Relations Board illustrates this solution. Board members decide whether or not to issue orders, but the General Counsel, appointed by the President, has final authority to investigate charges, issue complaints, and present evidence before the Board.[15]

Separation of such "commingled"[16] functions into completely independent agencies presents a more conventional solution. Proponents of proposals of this type differ over questions of to whom the separated functions should be transferred[17] and what should become of the remaining agencies,[18] but all agree that functions of judge and prosecutor should somehow be completely separated, for their continued coincident exercise by one agency threatens liberty and our system of government.

The Federal Trade Commission in Operation

Does this reasoning really apply to Federal Trade Commission cease and desist order proceedings?

A letter of complaint by a business unit, trade association or individual member of the public begins the typical case. These letters are referred immediately to a Bureau of Investigation, headed by a Director, who is substantially independent in daily operation from the five Commissioners. In 1956, 3,141 such letters flowed into the Bureau, which referred approximately 150 to other government agencies primarily concerned, closed approximately 250 involving only private controversies, and closed 150 others because of abandonment or insignificance of the practice complained of. Another 200 were filed without action because the petitioner refused to furnish further necessary information. From the 3,141 letters or petitions received during 1956, the Director of the Bureau of Investigation scheduled 547 field investigations.

On scheduling an investigation, the Director assigns the case to a project attorney responsible for the subsequent progress of the investigation to completion. If, at any time during the investigation, the project attorney concludes that there was no violation of the law, he closes the case. On completion of the investigation, if the Director of the Bureau of Investigation concludes that a formal complaint should be issued, he refers the case to a separate Bureau of Litigation, also headed by a Director, for preparation of the complaint after an independent determination that the files warrant further proceedings.

The Director of the Bureau of Litigation refers his draft complaint to the Commission, which decides by vote of the Commissioners, whether or not the complaint should be issued. If the Commission decides to go forward, the Secretary serves a copy of the complaint on the respondent, and the Bureau of Litigation begins preparation for presentation of evidence before a hearing examiner, who is independent of both the Commission and the Bureau of Litigation. From the hearing examiner's initial decision, an appeal to the Commission is available to the respondent or to the attorney for the Bureau of Litigation.

Functions of developing, presenting and evaluating evidence are thus substantially separated in the above process. No single individual or identifiable group of men acts as both judge and prosecutor, as those terms are traditionally used. No one person advocates and decides.

Proponents of a special Trade Court argue that Federal Trade Commissioners, in participating as they do in the decision to issue a complaint, must pre-

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8. The questionnaire is contained in an unpublished mimeographed compilation, Part VI of the Report of the Task Force on Legal Services and Procedure, Appendices and Charts (February, 1955).

9. *Op. cit. supra*, note 3, at 3.

10. 38 Stat. 719 (1914), as amended 15 U.S.C. § 45 (1952).

11. 38 Stat. 734 (1914), as amended, 15 U.S.C. § 21 (1952).

12. See, for example, Sellers, *The Administrative Court Proposal — Or Should Judicial Functions of Administrative Agencies Be Transferred to an Administrative Court?* 23 J. Bar Assoc. of D. C., 703 at 706 (1956) and Clark, *The Judicial Functions of the Federal Trade Commission Should Be Transferred to the District Courts*, speech in debate at the Association's Section of Antitrust Law meeting, April 5, 1957, Washington, D. C.

13. Brownl. & Golds. 255, 265; 123 Eng. Rep. 928, 933 (1609).

14. Opposition to the passage of the Interstate Commerce Commission Act was described as follows:

"The assault that it was unconstitutional . . . was led by Senator Evarts, of New York, accredited to be a distinguished lawyer and head of the American Bar, former Secretary of State. So confirmed was Senator Evarts that it was not in the power of the Government to vest this form of inquisition—to use the words of the able Senator from Utah [Mr. Sutherland] within an administrative body, that he denounced the act as being a reflection upon the intelligence of [the Senate, and later] gave the passage of the act as evidence of the decadence of wisdom on the part of the Senate." Statement of Senator Lewis, 51 Cong. Rec. 12925 (1914).

15. 61 Stat. 139 (1947), 29 U.S.C. § 153 (1952).

16. Commission on Organization of the Executive Branch of the Government, Report on Legal Services and Procedure 84 (1955).

17. Resolution 4 speaks of "Specialized Courts". Herbert W. Clark, member of the Hoover Commission Task Force Group which proposed an "Administrative Court", advocated in his speech cited, *supra*, note 12, that the functions in question be transferred to the United States District Courts.

18. Ashley Sellers foresees a role for them "to implement Congressional policy in the rule-making field, and vigorously to enforce the law before the Courts in their respective areas of jurisdiction." Sellers, *op. cit. supra*, note 12, at 706.

judge issues to such an extent that the respondent gets no fair hearing when he later comes before the Commission on appeal from a hearing examiner's initial decision. Since the Commissioners have once voted to issue a complaint, so goes the argument, the proceedings have become their "cause", which they will later "judge".[19]

A fairer and more accurate analogy to the Commission's approving the issuance of a complaint is that of a judge's ruling on a demurrer to the pleadings. In voting to issue a complaint, the Commissioner satisfies himself that the proposed draft complaint states a violation of law and that a proceeding is in the public interest, assuming the facts alleged to be true. The process is also similar to that of the Supreme Court's deciding to grant certiorari. A judge who overrules a defendant's demurrer does not become identified with the "cause" of the plaintiff, nor does the Supreme Court Justice who votes to grant certiorari commit himself to an eventual overruling of the lower court's decision on behalf of the petitioner.

In *Dr. Bonham's Case*,[20] Coke could talk of no man's judging his own cause because the Royal College of Physicians had been given authority by statute to fine unlicensed practitioners, and the College received one half of the fines. Federal Trade Commissioners play no such role. They can fine no one. They will not be enriched or promoted by the issuance or non-issuance of a cease and desist order.

One might argue, nevertheless, that a Commissioner has committed himself to a course of action in voting for the issuance of a complaint, and he will not wish later to admit his error by dismissing the complaint. Based on such an argument, one would expect nearly all formal proceedings to result in cease and desist orders. Consider the fact, though, that of fifty contested cases disposed of by final order during 1956, in sixteen (or 32 per cent), the Commission dismissed the complaint after full proceedings. This figure suggests a lack of prejudging in a significant number of cases as a matter of fact, regardless of the theoretical possibilities.

Perhaps the closest analogy in the judicial world to the Commission's role of double participation is that of the judge who issues a temporary restraining order and later hears the case on whether or not to issue an injunction. This is certainly more like what the Commission does than is the role of the College of Physicians in *Dr. Bonham's Case.*

The Cease and Desist Order: What Is It?

The nature of cease and desist orders of the Federal Trade Commission is frequently misunderstood,[21] perhaps because of lack of attention to the provisions for enforcement of the Commission's orders. Such orders are not criminal sanctions, as the "judge-prosecutor" argument might suggest. The Commission cannot levy fines or order imprisonment.[22] If the Commission finds that respondent has violated the law, it simply orders respondent to stop and to refrain from such violations in the future. These orders are not self-executing. They look like injunctions, but are, in fact, weaker.[23]

Respondent may in any case appeal to a United States Court of Appeals, (with further petition for certiorari to the United States Supreme Court), to set aside the Commission's order to cease and desist.[24] If respondent elects not to petition to the courts for review, but violates the order, affirmative action by the Commission to enforce its order may take one of two routes. Federal Trade Commission Act orders become "final" upon expiration of the time allowed for filing an appeal therefrom, if no petition for review is filed.[25] Enforcement of such orders is through a civil action brought by the United States for a civil penalty.[26] In such an action, the United States Attorney must show that the Commission issued an order pursuant to a certain statute and prove that the defendant has, in fact, violated the order.

Clayton Act orders become final only through their affirmance by a United States Court of Appeals, and a court order for enforcement will follow only if the Commission's attorneys can show a violation of the order following its issuance by the Commission.[27] If a Court of Appeals orders enforce-

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19. But see Cooper, *Administrative Law: Let Him Who Hears Decide*, 41 A.B.A.J. 705, 708 (1955):
"Since the Commissioners, on hearing oral argument, are unfamiliar with the case, counsel for respondent must utilize his allotted time to acquaint the members of the Commission with the broad outlines of the case. . . ."

20. Cited, *supra*, note 13.

21. The misunderstanding is not limited to those who have little experience in federal administrative law. See, for example, Rowe, *Price Differentials and Product Differentiation: The Issues under the Robinson-Patman Act*, 66 YALE L. J. 1 at 13 (1956), where a serious student of the Federal Trade Commission in referring to the Commission's decision to issue a cease and desist order in General Foods Corp., FTC Docket 6018 (1956), states: "General Foods was *convicted* [my italics] of 'injurious' price discrimination" and failure to supply distributors on proportionally equal terms.

22. Contrary to the implications of a statement in *Crafts* v. *Federal Trade Commission*, 244 F. 2d 882 (9th Cir. 1957), where the Court discusses (at page 893), the "authority of the Commission to regulate *and punish* advertising in the business of insurance" [my italics].

23. "The cease and desist order is, in effect, an administrative injunction." Harris, *The Hoover Commission Report: Improvement of Legal Services and Procedure*, 41 A.B.A.J. 713, 716 (1955).

24. Section 5(c), Federal Trade Commission Act, 15 U.S.C. § 45(c) (1952); Section 11, Clayton Act, 15 U.S.C. § 21 (1952).

25. Section 5(g), Federal Trade Commission Act, 15 U.S.C. § 45(g) (1952).

26. Section 5(l), Federal Trade Commission Act, 15 U.S.C. § 45(l) (1952).

27. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952).

ment of a Clayton Act order of the Commission, punishment then lies for contempt of the Court's order.

Thus, in enforcement proceedings against respondents violating Commission orders, the Commission, through its staff, and through the Justice Department and United States Attorneys, may truly be acting as a "prosecutor" though indirectly,[28] but such proceedings are conducted in the United States District Courts for enforcement of Federal Trade Commission Act orders and in the United States Courts of Appeals for enforcement of Clayton Act orders. In either case, the "judge" is a third independent party.

Before any respondent may be penalized[29] for violation of an order under the Federal Trade Commission Act, he may question the Commission's interpretation of the law through review in the appellate courts, and he may defend before a jury, if he requests one, in the civil penalty proceedings on the issues of fact of violation of the order. Under Clayton Act orders, respondent gets court review of the Commission's determinations of law, and the facts of violation are litigated under supervision of the Court of Appeals. In neither case is the Commission "judge in its own cause".

Separation of Powers

A more subtle and even more misunderstood argument for the recommendation of Resolution 4 grows from the doctrine of separation of powers.[30] This argument proceeds: (1) good government requires that all powers of government be divided into three branches: executive, legislative, and judicial; (2) a number of administrative agencies, including the Federal Trade Commission, exercise a combination of executive, legislative, and judicial powers; (3) a start can be made toward unscrambling this improper mixture by transferring the "judicial" powers of the Federal Trade Commission to a "court".

The Federal Trade Commission Act declares unlawful "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce".[31] The Commission is authorized to issue cease and desist orders to prevent such methods, acts or practices.[32] With certain exceptions,[33] the statute does not spell out what are "unfair methods of competition" or "unfair or deceptive acts or practices". Congress gave this task to the Commission.[34] Each time that the Commission issues an order to cease and desist under the Federal Trade Commission Act, it is filling in the meaning of the statute, as well as deciding a dispute over facts between the respondent and the Bureau of Litigation. Although this sort of defiance of the doctrine of separation of powers was protested by some as unconstitutional, the Supreme Court of the United States has never found it so.[35]

Whether or not the Constitution permits it, proponents of the Trade Court say that this "impairment of the basic structure of the national government"[36] is an undesirable development, and we should try to return "essentially judicial functions to the judiciary".[37] Even if we assume, for purposes of argument, no present validity in the reasons of policy which motivated Congress to establish the Federal Trade Commission in 1914 with the particular powers assigned to it, it is difficult to isolate "essentially judicial functions" among those performed by the Commission. Experts disagree. One group finds the issuance of cease and desist orders to be a "judicial function";[38] another finds this a "mixed function";[39] a third finds it "approaches closely the legislative field".[40] One distinguished group found that the only properly "judicial function" of the Federal Trade Commission is its duty to aid the federal courts in working out dissolution decrees.[41]

The February, 1957, draft bill to carry out Resolution 4, prepared by an advisory group of the Special Committee on Legal Services and Procedure would transfer all the Commission's cease and desist order authority under both the Federal Trade Commission and Clayton Acts to an Administrative Court, to be established under Article III of the Constitution. To the extent that such transfer includes the Commission's authority to define "unfair methods of competition" and "unfair or deceptive acts or practices", it could be argued that this might be an unconstitutional delegation of legislative power to the judicial branch of the government in violation of the very doctrine which the transfer is supposed to strengthen.[42]

Regardless of such legal niceties, the practical reason behind the doctrine of separation of powers is that it is wise to prevent any one man or group of men from becoming so powerful that they can dominate, rather than represent, the American people. Where this reason does not apply, neither should the doctrine. The danger to be avoided is one of unchecked power, not combination in one government agency of functions different in legal concept. There is little danger that the Federal Trade Commission, through its power

(Continued on page 493)

28. "The administrative body exercises no more authority from a functional point of view than a public prosecutor." McFarland, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION 10 (1933).
Mr. McFarland, who was chairman of a Hoover Commission Task Force Group which proposed an Administrative Court, advocated, as a matter of principle, "complete segregation" of adjudication functions from administrative agencies in 1941. Attorney General's Committee, Report on Administrative Procedure in Government Agencies 205, 209 (1941); S. Doc. No. 8, 77th Cong., 1st Sess. Mr. McFarland spoke in dissent from the Committee's conclusion that "complete separation of functions would make enforcement more difficult and would not be of compensating benefit to private interests." *Id.* at 60.

29. Since a cease and desist order is not a "final judgment or decree . . . rendered in any civil or criminal proceeding brought by or on behalf of the United States," respondent loses nothing by it in treble damage actions brought under Sections 4 and 5 of the Clayton Act, 38 Stat. 731 (1914), as amended 15 U.S.C. § 15 (1952) and § 16 (Supp. III 1956).

30. A historically ambiguous doctrine. See, Sharp, *The Classical American Doctrine of "the Separation of Powers"*, 2 U. CHI. L. REV. 385 (1935) and Sabine, A HISTORY OF POLITICAL THEORY, 558-60 (1949).

31. Section 5(a)(1), Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1952).

32. Sections 5(a)(6) and 5(b), Federal Trade Commission Act, 15 U.S.C. §§ 45(a)(6) and 45(b) (1952).

33. Section 12, Federal Trade Commission Act, 15 U.S.C. § 52 (1952) and various provisions of the Wool, Fur, and Flammable Fabrics Acts define certain unfair methods of competition and unfair or deceptive acts or practices, 15 U.S.C. §§ 68a, 69a, (1952) and 15 U.S.C. § 1192 (Supp. III 1956).

34. See Report of the House Managers of "an act to create an interstate trade commission", 51 CONG. REC. 14924 (1914) and *Federal Trade Commission v. Cement Institute, et al.*, 334 U.S. 683, 708 (1948).

35. Davis, ADMINISTRATIVE LAW 27 (1951).

36. Commission on Organization of the Executive Branch of the Government, Task Force Report on Legal Services and Procedure 246 (1955).

37. *Ibid.*

38. Commission on Organization of the Executive Branch of the Government, Task Force Report on Legal Services and Procedure 242 (1955).

39. President's Committee on Administrative Management, Report with Special Studies 231 (1937).

40. American Bar Association, Report of the Special Committee on Administrative Law 238 (1936).

41. President's Committee on Administrative Management, Report with Special Studies 230-1 (1937). See also, *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935).

42. See Comment, *The Distinction Between Legislative and Constitutional Courts*, 43 YALE L. J. 316 (1933).

Illinois Supreme Court

Outlaws Union's "Legal Aid" System

The Supreme Court of the State of Illinois on March 20, 1958, handed down its opinion in *In re Brotherhood of Railroad Trainmen*. The case takes its name from the fact that it involves the Brotherhood of Railroad Trainmen, a 260,000-member union.

The Brotherhood created a plan in 1933 whereby it sought to make it possible for an injured union member to obtain prompt legal service. The union believed this was necessary so as to protect the injured worker from an improvident settlement of his case with the railroad claim agent. The plan, as it worked out, involved designation by the Brotherhood of sixteen sets of attorneys throughout the United States, known as "Brotherhood Regional Counsel". If a Brotherhood man was injured on the job, it became the duty of the local union lodge officer to contact him at once. The local union officer was supposed to give the injured man some advice about his rights. He was also supposed to offer him the services of a lawyer, one of the Regional Counsel. The union officer and the injured man were entitled to one "free trip" to the office of this lawyer Regional Counsel. The attorney paid the union officer for his working time and expense in bringing the case to him. Frequently the attorney paid a $100 "gratuity" to the union officer as well. The attorney also paid the expense of the "free trip". The attorney offered to represent the man for a flat 25 per cent contingent fee. When the man needed a loan, the attorney advanced money to him, which money was generally repaid only in the event a judgment was collected. It can be seen that the plan, as it was worked out, was not the same thing as the plan to protect the injured man from railroad claim agents.

The Brotherhood Plan was frequently called in to question, most recently in Illinois. In 1954, a disciplinary proceeding was filed against certain Chicago lawyers who had acted for some years as Chicago Regional Counsel for the Brotherhood. The complaint charged unprofessional conduct in that they solicited several specified personal injury cases. In 1956, the respondent attorneys petitioned the Illinois Supreme Court for a declaratory judgment to the effect that the Brotherhood Plan was a valid "legal aid" plan and that there was nothing unethical or improper in the practice. The Court, in June, 1956, appointed a Special Commissioner to investigate "the condition" revealed by the petition.

The Supreme Court order of June, 1956, immediately came to the attention of the American Bar Association. The Board of Governors, recognizing that the matter involved important issues relating to the unauthorized practice of law by a labor union, as well as serious questions of professional ethics, authorized the Committee on Unauthorized Practice of the Law to seek leave to intervene in the proceedings as *amicus curiae*.

The Special Commissioner held hearings in September and October of 1956. The Illinois State Bar Association, the Chicago Bar Association and a group of twenty-seven railroads participated in the hearings by their counsel. Following the close of the hearings, the Special Commissioner asked that briefs be filed. The American Bar Association brief, prepared by Messrs. Thomas J. Boodell, Chairman of this Association's Committee on Unauthorized Practice of the Law, and Wayland B. Cedarquist, both of Chicago, took the following position:

> The American Bar Association contends that the Brotherhood's part in this "legal aid" enterprise is prohibited by law and that the part played by the attorneys in the enterprise is prohibited by the Canons of Professional Ethics. The "condition" is contrary to the best interests of the legal profession and the public. The "condition" should not be permitted to continue.

The brief was accompanied by a fifty-five page appendix setting forth the pertinent Canons of Professional Ethics, a copy of Informative Opinion A of 1950 of the American Bar Association's Committee on Unauthorized Practice of the Law, and other pertinent matters.

The *per curiam* decision handed down by the Illinois Supreme Court, on March 20, 1958, holds that the Brotherhood Plan is not consistent with "the principles that must govern the members of the legal profession in their relations with clients". The decision recognizes the problems arising from personal injuries of railroad workers and states that the Brotherhood may investigate accidents (with investigative costs to be paid by the union members as part of their dues), and that the Brotherhood may make known to union members the advisability of obtaining legal advice before making a settlement, and also may furnish the names of attorneys who are qualified to handle such claims. The opinion, however, prohibits any financial connection between the Brotherhood and any lawyer and states that no lawyer can properly pay anyone compensation of any kind for bringing cases to him. The opinion requires the Brotherhood to complete the changes in its plan of operation not later than July 1, 1959. The Court observes that a reorganization of the Plan, as indicated, will make it possible for the Brotherhood to achieve its legitimate objectives "without tearing down the standards of the legal profession".

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A Well Led Bar

So much respect is accorded lawyers that sometimes we are prone to regard it as our due, something won at the time that we were admitted to the Bar and our own thenceforward. If, however, too many of us get that idea and get it too often, the respect will no longer be forthcoming. The community owes us nothing except what we earn. If the public can devise some better means for the guidance of the citizen in his relations with the rules of organized society than a Bar with the exclusive right to practice law, there is no reason why the people should not abolish the Bar and substitute the alternative found to be preferable. Unless we justify our existence we shall cease to exist.

Judges may do much by leading the Bar away from the attitude of holders of a lucrative sinecure. On the other hand wherever a judge condones the low standard of the dregs of the Bar he not only hurts those whose low standards he condones but drags the rest of the lawyers down to their level. A lawyer who thinks that he is entitled to be paid simply because he holds a franchise and has been consulted by a layman can afford to charge much less than a lawyer who puts time and effort into his advice. Thus the competition of those who merely sit at the receipt of custom reduces the standards of their fellows who would prefer to do a thorough job. Where judges in disciplinary proceedings refuse to punish lawyers who take the easy way of shady practice in criminal cases, the criminal courts are deprived of the services of the reputable members of the Bar who realize that they cannot compete with lawyers whose elastic consciences are given free rein by the complaisant attitude of those judges.

The important thing is not that abuse of our privilege would result in our loss of it and with it our livelihood. All of us in our hearts believe that the reign of law can best be maintained by an independent Bar endowed, because of industry, learning, ability and character, with the exclusive privilege to practice law. In order to preserve that system for the service of humanity we must, Bench and Bar alike, devote ourselves to the cultivation and application of those talents.

"LRS" Is Ten Years Old

During 1956 more than 45,000 Americans in ninety-eight cities were the beneficiaries of Lawyer Referral Services. This is no small achievement because ten years ago "LRS" existed in only twenty-eight cities in this country.

We are publishing in this issue of the JOURNAL an article by Mr. Theodore Voorhees which makes an interesting comparison between the English Legal Aid and Advice Act of 1949 and the accomplishments here in America during the last decade in the same field. It is important to note that the English system has been limited to Legal Aid itself, and that the English do not have what we call a Lawyer Referral Service. The English system is imposed by law; our American system is purely voluntary. Participation by an individual lawyer in both England and America is also only on a voluntary basis. Legal Aid here in America is now found in 283 counties; Lawyer Referral has not yet become so widespread. One of the deterrents to the Lawyer Referral Service has been the fear that lawyers would lose their own good clients, but Mr. Voorhees' article points out that the actual results do not bear out this fear. He said:

> On occasion, individual lawyers have expressed the fear that the referral service would draw away "good clients" from their former attorneys. In actual operation of the services, however, no instances of this kind have been reported.

In our Lawyer Referral Service we appear to be one step ahead of Great Britain. The British are now studying our system with a view to testing it in England. Our own plan needs the implementation of more and better publicity. We may well take pride in what has been accomplished to date, no small share of which can be ascribed to the fine work of Mr. Voorhees himself. In reading his interesting article on this important subject, the reader might keep in mind Mr. Justice Robert H. Jackson's sage advice on this subject:

> Today any profession that neglects to put its own house in order may find it being dusted out by unappreciative and unfriendly hands. Society shows a growing disposition to

call the professions to account for the use made of their privileges. The medical and dental professions have fallen under critical examination, not only in England but also in the United States. Society, of course, has a legitimate and immediate interest in the faithful functioning of the Bar. It is only the part of wisdom for the leadership of any profession to anticipate the problems and difficulties of those it undertakes to serve and to remedy them before they grow to public grievances.

Editor to Readers

The whole legal profession, Bench and Bar alike, as well as the public in general, suffered a grievous loss in the recent death of John J. Parker, Chief Judge of the United States Court of Appeals for the Fourth Circuit. He possessed in high degree all the qualities indispensable to greatness in a judge. His character was of the highest, his courage unflinching, his integrity beyond reproach, his temperament ideal; he was patient and diligent, kindly but firm, of fine intellect and vast experience. Genial and companionable, he was a delightful associate in any undertaking. We are privileged to present a sympathetic and understanding editorial, written by Cecil Prince, Editor of The Charlotte News, *submitted to us by the publisher, Thomas L. Robinson.*

John Johnston Parker's legacy was a vision of faith in the full promise of American life. Consequently, he left us all extraordinarily wealthy.

In fair weather and foul, he lived his faith with remarkable fidelity.

He was the rock in the storm, the Gibraltar of principle. Though highly sensitive, he maintained his intellectual and emotional rectitude with unruffled serenity. And yet he would labor with a heroic perseverance for convictions which formed the basis for what can only be described as a classical philosophy of democracy.

It is impossible to treat him as a tragic figure, although all the elements of tragedy are present. It is said that his ambitions were cruelly thwarted, that his greatest judicial decision was reversed, that his career was sabotaged by fools. But to maintain that Judge Parker was victimized or even to a considerable extent affected by these circumstances is to underestimate the man. He rose above them. He triumphed over the shallowness of lesser men. He remained serene and aloof from all matters unmeasured by his own sensible devices, pure motives and reliable intuitions.

If there was a central idea that dominated Judge Parker's life it was his dedication to justice in its purest and most elementary form. It became the leitmotif of his existence, the imperative and consoling force that governed his actions both on and off the bench. It set in motion all of the forces of instruction and imagination that produced his vision of a perfectible society—the assertion of truth, the unveiling of illusion, the dissipation of hate.

He was called a liberal by some, a conservative by others. But he defied the labelers.

"The true liberal and the true conservative," he told a newsman who came to call in 1955, "have a great deal in common. The true conservative wants to conserve principles. He knows they can be preserved only through change. The true liberal strives for the ideal. Neither of them have anything to do with the 'conservative' who wants to cling to the past or the 'liberal' who wants to change just for the sake of change."

Judge Parker drew from both philosophies to express his passionate belief in the promise of America.

"There is much loose talk about democracy," he said some time ago, "but we must never forget that democracy is more than a form of government. It is a philosophy of life, a philosophy based upon the worth and importance of the individual, a philosophy which believes that institutions exist for men and not men for institutions, and that the happiness of the poor and the humble is of as much importance as the happiness of the great and the proud. Our country came into existence proclaiming this philosophy as her confession of faith. 'We hold these truths to be self-evident,' says our Declaration of Independence, 'that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness, and that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.' And the greatness of America consists in the fact that she has lived up to this philosophy. She is great, not because of the strength of her army or her navy, not because of the wealth of field or forest or mine or factory, not because of the splendor of her cities or the learning of her colleges and universities, but because in her heart of hearts she believes in the sovereignty of the individual soul and the open door of opportunity for every man irrespective of race or color or religion or any other circumstances."

But Judge Parker was no Pollyanna of complacency. He recognized the continuing challenge of progress. He responded belligerently to all of the hosts of darkness that threatened the freedom of the individual. In so doing, he cut through all of the pious orthodoxies and milksop cant to the central truths of his time.

In defending the principles embodied in the United States Constitution, no man has ever fought with such tenacity and grace.

"It is easy enough to believe in freedom of religion for Episcopalians or Baptists or Presbyterians," he once said. "The test is whether we believe in that freedom for Mohammedans or Buddhists or atheists. It is easy enough to believe in free speech for Republicans and Democrats. The rub comes when it is applied to Communists and Fascists and others whose teaching is hostile to our institutions. We must never forget that unless speech is free for everybody it is free for nobody: that unless it is free for error it is not free for truth: and that the only limitations which may safely be placed upon it are those which forbid

slander, obscenity and incitement to crime. As said by Jefferson: 'We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by false reasonings.'

"It is so easy for the unthinking to persuade themselves that the end justifies the means and that a violation of fundamental principles should be allowed in the interest of a supposed public good. The answer is that we shall have fought the battle against the enemies of freedom in vain if in fighting we destroy freedom itself."

We have never known another man who was more just, nor one of sinewy will and powerful principles who was more gentle and forbearing.

A Great Judge and a Great American:

Chief Judge John J. Parker, 1885-1958

Chief Judge John J. Parker of the United States Court of Appeals for the Fourth Circuit, a jurist on that Court for thirty-two years, died in Washington, D. C., of a heart attack on March 17, 1958, at the age of 72. He was one of the most respected figures in American jurisprudence and contributed as much as any man in our day and generation to the improvement of justice in the federal judicial system.

Born in Monroe, North Carolina, November 20, 1885, Judge Parker was graduated from the University of North Carolina in 1908. He was president of his class, headed the student council, the Athletic Association, and Phi Beta Kappa honorary scholastic society. Dr. Julian Miller, late editor of the *Charlotte Observer*, once observed that "John Parker went to the university as a poor boy who didn't even have a trunk, but he graduated with a trunk full of medals." He is survived by his wife, Maria; a son, Francis Parker, Charlotte attorney; and a daughter, Mrs. Rufus Ward, of Spartanburg, South Carolina.

He was the Republican nominee for Congress in 1910, for State Attorney General of North Carolina in 1916, and for Governor in 1920. In 1923 he gained national prominence when he served as Special Assistant to the Attorney General of the United States in the prosecution of war fraud cases. Four Presidents thereafter recognized his outstanding ability. In 1925, at the age of 39, he was appointed by President Coolidge to the Fourth Circuit Bench, and in 1930 was nominated by President Hoover for the Supreme Court. His nomination was blocked in a bitter Senate battle by a 41-to-39 vote. Judge Parker's defeat has been attributed primarily to an opinion he wrote in a labor case, of which it has been said by many that he faithfully followed Supreme Court decisions and existing statutes. Some of his critics later stated publicly that they regretted having voted against him.

His true greatness lies in the fact that he not only refused to harbor any bitterness, never lost his sense of humor and his high optimism, but carried on for twenty-eight more years working harder than ever to improve the administration of justice, despite the fact that he suffered the greatest disappointment in the history of an American lawyer. "As he looked back on the Supreme Court appointment, he began to feel that appointment to the court might have isolated him and kept him from circulating among the people," said Dr. Otto Ross, Sr., an intimate friend of Judge Parker.

When President Roosevelt had to make an important decision in a controversy between the Comptroller General and the War Shipping Administration as to the rules to be applied to the valuation of vessels requisitioned by the United States, he appointed Judge Learned Hand, of New York, Judge Joseph C. Hutcheson, Jr., of Texas, and Judge Parker to make the decision for him. When President Truman sought the best legal authorities in America for the German war trials, he called upon Judge Parker. Sir Norman Birkett, the British representative on the tribunal, later stated: "In the closed sessions of the court, decisions of the greatest moment had to be taken; and it was there that Judge Parker's contribution frequently was decisive." He brought to that experiment in international justice the American concept for due process and respect for individual rights.

In 1943, Judge Parker was awarded the American Bar Association Medal, the highest honor given by the Association, for distinguished service in improving the administration of justice. Not content with merely presenting a practical program for the improvement of the administration of justice, he served on Special Committees of the Association and of the Judicial Conference, advocating to judges and lawyers the country over his program to improve the administration of justice. He continued this crusade to the day of his death by correspondence, by conferences and by speeches in probably every state in the Union, with results undreamed of by his associates. He expedited decisions; reduced costs of litigation; was one of the draftsmen of

the act creating the Administrative Office of the United States Courts; took a leading role in establishing pretrial procedure; advocated the wise use of rule-making power; was responsible for writing and supporting before Congress the measure that created the present federal court reporting system; was one of the persons chiefly responsible for the Federal Youth Corrections Act; was a most influential leader in the adoption of the Federal Civil and Criminal Rules of Procedure; and played an important part in the improvement of the jury system and the bankruptcy system. As far back as 1931 he instituted the Judicial Conference of the Fourth Circuit, at which federal judges and members of the Bar meet annually for a frank and informal discussion of their common problems. The success of this Conference led to the establishment by statute of similar conferences in each federal circuit. These are but a few of the many worthwhile improvements in procedure which exist today because of the imagination and courage of Judge Parker. While many judges have lived longer lives, it has been given to few to have lived as useful a life.

He was active in the American Bar Association as a member of the Council of the Section of Judicial Administration from 1938 until his death; Chairman of that Section, 1936-1937; Assembly Delegate, 1947-1948; and served on many important committees. He helped to establish state committees on court reform all over the nation, which were often referred to as the "Judge Parker Committee". At the time of his death, no other living Federal Circuit Judge in active service had served so long as a Circuit Judge. The span of his service is indicated by the fact that he served under five Chief Justices of the United States, and all of them honored him by appointment to important committees to direct the policies of the federal judiciary.

In this unselfish service he inspired respect for the law and the courts in the minds of all with whom he came in contact. He was a man of high ideals and untiring industry, of wide human sympathy and fearless devotion to truth and justice. In and out of court he possessed a calm temperament and tremendous personal dignity. It was the late Chief Justice Vanderbilt who said: "No lawyer who has ever appeared in his court will forget the experience. . . . Would that every appellate judge in the United States might have an opportunity to spend a full day in the Fourth Circuit Court of Appeals!"

Judge Parker took part in the decision of a large number of cases involving the expanding powers of the Federal Government in the regulation of the economic life of the country. His opinions indicate his often-expressed belief that "true conservatism consists in preserving the spirit, not the form, of existing institutions, and that true progress consists, not in mere change for the sake of change, but in adapting the age-old principles of the law to meet the changing conditions of life". He recognized that the most important function of the judiciary was to make this adaptation. Large business could see in his decisions the value of his experience and broad vision. The poor and unfortunate found him to be an honest, sympathetic and courageous judge. His gentle persuasive personality and his knowledge of the law allowed him to make a contribution to his country unique in our times.

Throughout his opinions we trace a thought that the law was meant to serve and not to rule the institutions which it shelters. He was more interested in substance than form; in justice than in technicalities. Kindness and understanding were instinctively with him. He was able to stand aloof from bitterness and strife which too often characterize honest differences over policy. He had a deep insight into human nature, broad information as to precedents, and a memory that seemed to be without limit. Perhaps his greatest asset was his ability to absorb and retain basic principles of law and to apply them with discernment to issues arising in a changing society.

Wherever he went to speak to bar associations, he challenged the assembled lawyers and judges to measure up to responsibility and leadership. At the time of his death he was in Washington to attend the Judicial Conference, to attend two committee meetings of federal judges, and to speak to a group of lawyers on "Law in the World Community". This intense activity was so characteristic of Judge Parker, because his whole life was a brilliant record of enlightened and intelligent leadership. He was a warm friend, an accomplished teller of stories and anecdotes, a devoted husband and father, and a devout churchman.

Chief Judge John J. Parker

He stood like a granite boulder in midstream, immovable against the flow of what he conceived to be dangers to the rights of the individual under fundamental law. Massive in face and form, great in intellect and pure in heart, he was strength in its best human personification. He brought this superior strength into full use at a time when his country needed it. Such a life cannot end with death. The work of this great judge and good man will continue to live and bear fruit. He lives in the contribution he has made to the law of the land through his decisions. He lives in the hearts of all who are interested in improving the administration of justice. He lives in the hearts of thousands who loved him, and in our lives he will be a vital influence for many years to come. His high place in the history of the federal judiciary and in the history of the nation is secure. He was a great judge and a great American.

HARRY E. WATKINS

United States District Court
for the Northern and Southern
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A Long Quest:

The Search for Administrative Justice

by Edgar A. Buttle • *of the New York Bar (New York City)*

The enactment of the Federal Administrative Procedure Act in 1946 was a long-step forward in what Mr. Buttle calls the "search for administrative justice". A dozen years' experience with that statute, however, have revealed certain flaws that need correcting. Several proposals were made by the Hoover Commission's Task Force on Legal Services and Procedure and these have been endorsed by the American Bar Association. Mr. Buttle examines the broad aspects of the problem of administrative law in Anglo-American jurisdictions and compares our experience with that of the French, whose *droit administratif* contains many elements that we might well imitate.

Federal administrative law is that body of legislation, judicial precedent and practices which controls the operations of the departments, agencies and offices of the Executive Branch of the Government. Traditionally, the legal profession and the public have regarded this field of law as a specialty.

Nothing could be further from the truth than the belief that administrative law is the exclusive province of the specialist in the field. This branch of the law should be the concern of every citizen and every general legal practitioner throughout the United States. For federal administrative law can and does affect more persons in every state of the Union than any other specialized branch of the law. When an income tax return is prepared and filed, when the farmer markets his milk, when the corporation markets its securities, or when Social Security awards are claimed, some phase of that law is involved.

The field of administrative law in the United States is as broad as the field of national government. Prior to 1887, this field was confined to the activities of the traditional departments of the Executive Branch, such as State, Treasury, Interior and Commerce. But the ten departments represented by the Cabinet members existing today are only part of the governmental organization which comprises the present Executive Branch. In addition, there are some sixty-odd independent agencies and offices which, since the establishment of the Interstate Commerce Commission in 1887, have become more and more a common feature of our national government.

The scope of authority of these departments and agencies in the Executive Branch is even more extensive than the number of such organizations and their employees would indicate. For example, the Department of Agriculture exercises administrative powers under forty-five statutes, rule-making powers under twenty-nine statutes and presidential proclamations and adjudicatory powers under fourteen statutes. At the other end of the scale, so far as size is concerned—but not so far as influence is concerned—is the Federal Trade Commission exercising authority under five different statutes, including the Clayton Antitrust and Federal Trade Commission Acts. These agencies, operating in widely disparate fields, vitally influence the personal and economic life of the citizen.

It has been recognized that the exercise of substantial justice in adjudicating administrative matters necessitates the establishment of uniform procedures and judicial or quasi-judicial tribunals, name them what you will, adaptable to administrative processes, capable of rendering findings with dependable finality and having sufficient formality to warrant public respect. With this background in mind, the Second Hoover Commission appointed a Legal Task Force to survey the field and make appropriate recommendations therein.[1]

The first comprehensive survey of administrative law was made by the Attorney General's Committee on Administrative Procedure in 1941.[2] Extensive hearings held by Congress

The views expressed are those of the author and are not necessarily those of any Government agency or department.

1. See Harris, *The Hoover Commission Report: Improvement of Legal Services and Procedure*, 41 A. B. A. J. 497, 618, 713 (1955).

2. Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941).

thereafter culminated in the passage of the Federal Administrative Procedure Act of 1946. The second such comprehensive survey in the field of administrative law was that made by the Legal Task Force of the Second Hoover Commission in 1954-1955.

The Administrative Procedure Act was enacted by the Congress to regulate and make uniform, where practicable, the administrative process, particularly in the control of private and property rights by agencies of the Executive Branch. This statute represented the culmination of nearly two decades of effort on the part of Congress, the Executive Branch, members of the judiciary and the organized Bar.[3]

After Ten Years . . . Amendment Needed

Twelve years' experience under the Federal Administrative Procedure Act has shown the merits and demerits of that legislation. The survey of the Hoover Commission clearly revealed that the time had come to amend that statute in order to achieve more efficient—and, in the long run, more economical—conduct of government business and greater protection of private rights and the public interest through expanded provisions for due process of administrative law.

Even though the legislation has proved of mutual material benefit to the government and all parties concerned, enactment of the Federal Administrative Procedure Act was fought vigorously by the majority of the departments and agencies of the Executive Branch. Their representatives either sought to have agencies completely exempted from the legislation,[4] or argued that "the general approach taken [in the proposed Act] . . . will have harmful rather than beneficial effects".[5] This same opposition appears to be developing at the present time toward the recommendations of the Second Hoover Commission. Thus, a member of the Interstate Commerce Commission has claimed that, inasmuch as "neither shippers nor carriers have ever seriously complained that our proceedings are unfair, unjust, or partial",[6] it follows that all's right in the administrative world. The argument, of course, overlooks findings to the contrary by the courts.[7]

One other argument currently being advanced by those who oppose administrative reform deserves mention because it threatens the very foundations of the supremacy of the law. This is that the "Federal Power Commission, Communications, and so forth are an arm of Congress. They are not a part of the Executive Department."[8] Although as a matter of law the independent regulatory agencies are usually created by Congress as a means of carrying into operation legislative and judicial powers,[9] they are part of the Executive Branch. They adjudicate, make rules and formulate policies in the same manner as each one of the ten departments of the Executive Branch. So long as Congress sees fit to place some of its functions in such agencies, no reason exists in law and justice why they should not be bound by the same limitations which affect the executive departments. The absurd, and possibly dangerous, lengths to which this argument is carried can be seen in the position taken by the Interstate Commerce Commission in rate-making proceedings that,[10]

> . . . the Commission is performing a purely legislative function and that representation before the legislative is not limited to attorneys at law. . . . The . . . [argument] is both overworked and of little practical consideration. It is true that the power to prescribe rates is a legislative function delegated to the Commission. But . . . the majority of rate cases today involve the litigation of private rights by parties with diverse interests. If a similarity ever existed between the functions of the Commission in this respect and the activities of the Congress, it has long since disappeared, and rate proceedings have tended to become more and more judicial or quasijudicial in nature. To say the least, the argument attempts to make a distinction without substantial meaning.

Administrative procedures should be made uniform and formalized, where practicable, in conformity with the traditional standards and safeguards developed by the courts, to the end that the administrative process will follow well-defined channels of authority and procedure, known to all parties, without the delays and manifest unfairness of *ex parte* consultation, political pressure and improper influence.

Forty-eight separate state jurisdictions, together with the Federal District Courts, daily follow a well-developed set of rules of procedure. Indeed, formulation of federal and state rules of civil and criminal procedure is recognized as a major step in improving the due process which the citizen receives from, and the efficiency with which its functions are performed by, the judiciary.

Yet most executive agencies oppose any practicable formulation of rules of procedure under well developed judicial standards, even though the substantive rights adjudicated by these agencies are just as vital to the private and business life of our nation as those adjudicated in the courts. With a few significant exceptions like the Tax Court, Federal Trade Commission and Securities and Exchange Commission, adaptation of judicial rules of evidence and procedure to administrative hearings is opposed within the government as "weakening" the administrative process.

Practicable uniformity along judicial lines can only strengthen that process by affording private citizens and nonfederal governmental bodies greater protection for their rights and by restoring complete public confidence in all phases of administrative activity.

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3. 5 U. S. C. A. 1001. The importance of this legislation cannot be overemphasized. At the time Congress was considering it, the then Chairman of the Senate Judiciary Committee stated: "I do not believe a more important piece of legislation has been or will be presented to the Congress of the United States . . . because it deals with something which touches the most lowly as well as the most elevated and lofty citizen in the land. It touches every phase and form of human activity. . . ." Sen. Doc. No. 248, 79th Cong., 2d Sess. 311 (1946).

4. *E.g.*, Hearings on S. 674 *et al.*, 77th Cong., 1st Sess. 783-786 (Federal Deposit Insurance Corporation); 557-568 (Immigration and Naturalization Service); 412-417 (Interstate Commerce Commission) (1941).

5. *Ibid.*, 512 (Railroad Retirement Board).

6. Arpaia, *Screened Assault on the Independence of the I. C. C.*, 23 I. C. C. Prac. J. 4, 5 (1955).

7. *E.g.*, *Riss & Co., Inc.* v. *U. S.*, 341 U. S. 907 (1951), reversing 96 F. Supp. 452 (D. C. Mo., 1950); *Matlack, Inc.* v. *U. S.*, 119 F. Supp. 617, 622 (D. C. Pa., 1954).

8. Proceedings of Section of Administrative Law, I. C. C. Comm. Arpaia, 78th Annual Meeting of the American Bar Association 97-98 (August 23, 1955).

9. *Humphrey's Executor* v. *U. S.*, 295 U. S. 602, 630 (1935).

10. Singer, *Practice of Non-Lawyers Before Interstate Commerce Commission*, 15 Fed. B. J. 177, 183-184 (1955).

The only "weakening" will occur in the exercise of undiluted administrative discretion.

Agency adjudication represents the exercise of quasijudicial authority within the framework of the administrative process. Its primary function is the formulation of an agency order which finally disposes of any matter other than by rule making. Under the Administrative Procedure Act, adjudication is considered "formal" where the agency action is required by statute to be determined on the record after opportunity for an agency hearing.[11] "Informal" adjudication represents the taking of such final action without a full scale hearing on the record.

Congress intended that agencies should give a broad interpretation to the concept of formal adjudication.[12] That certain agencies have failed to do so represents one of the major failures of the present legislation. Thus, claims by the Interstate Commerce Commission and the Post Office Department for exemption from the requirements of formal adjudication were overruled by the United States Supreme Court in *Riss & Co.* v. *U. S.*[13] and *Cates* v. *Haderlein*,[14] respectively. Yet both agencies still appear to follow a narrow, and overruled, construction of the statute, with consequent injury to administrative due process.[15]

As applied to the administrative process, separation of functions means that the authority within an agency which investigates and prosecutes cannot decide. Congress has recognized the failure of the Administrative Procedure Act[16] to achieve this desired separation by enacting special legislation affecting the National Labor Relations Board and the Federal Communications Commission. In the former agency, the General Counsel or prosecuting officer now is completely divorced from the deciding arm.[17]

Hearing Examiners . . . Mere Record-Makers?

Hearing examiners are the officers of the Executive Branch who conduct hearings required by statute or the Constitution to be made on the record, that is, formal adjudication. Orginally intended to be a body of legally trained independent triers of the facts, they have become, in some cases, mere makers of the record with no real independence of action and decision. Such examiners, as a whole, should be reconstituted as administrative trial judges, independent of agency pressure, thus assuring effective due process and a fair hearing for private parties.[18]

On January 22, 1957, a bill to implement perhaps the broadest legislative program ever to be recommended by the American Bar Association was introduced in the Congress. This bill, H.R. 3350, would establish a new and independent office of Federal Administrative Practice to administer a merit career service for Government lawyers and hearing commissioners, to consider representation before federal agencies, and to engage in studies of legal procedures and services. The American Bar Association, through its Special Committee on Legal Services and Procedure, has also introduced in the 85th Congress a bill, S. 2292, for the establishment of specialized administrative courts.[19]

Such trial courts have a predecessor in the Tax Court of the United States.[20] The proposed Administrative Court Bill would establish a court of record to be known as the Administrative Court of the United States. As to matters not within the jurisdiction of this Court, the statutory hearing procedures before a hearing examiner or commissioner should be continued, with improved stature.

A fundamental premise of the recommendations of the Hoover Commission and the American Bar Association for reform was the doctrine of the supremacy of the law. For, as the United States Supreme Court has stated,[21] "All the officers of the government from

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11. Section 5, 5 U. S. C. §1004.

12. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 37 (1950).

13. 341 U. S. 907 (1951).

14. 342 U. S. 804 (1951).

15. See *Door* v. *Donaldson*, 195 F. 2d 804 (D. C. Cir., 1952), in which the court rejected a Post Office Department claim of exemption for the adjudication of obscenity orders, and *Reliance Steel Products Co.* v. *B & O. Railroad Co.*, 291 I. C. C. 695, 696 (1954), holding that Section 5 of the Administrative Procedure Act applies "to oral hearings only and not proceedings conducted under the Commission's shortened or modified procedure".

16. Section 5(c), 5 U. S. C. §1004 (c).

17. 29 U. S. C. §§153(d), 154(a).

18. According to §11 of the Federal Administrative Procedure Act, hearing examiners are appointed pursuant to Civil Service for proceedings under Sections 7 and 8 and may perform no inconsistent duties. They are removable only for good cause determined by the Civil Service Commission after hearings, which are subject to judicial review. They are to receive compensation prescribed and adjusted by the Civil Service Commission independently of agency recommendations or ratings. Such hearing officers of the Appeals Council, Social Security Administration, Department of Health, Education and Welfare, are designated referees. Their functions in presiding at recorded hearings and rendering final decisions simulate in many respects the French Administrative Courts.

19. FEDERAL BAR NEWS, Vol. 4, No. 1, page 28 (January, 1957). The proposed bill also provides: "Any person who, on the date of the passage of the Act holds a position as a trial examiner or hearing examiner under Section 11 of the Administrative Procedure Act, if a citizen of the United States and a member of the bar of a State, Territory, or the District of Columbia, shall become a Hearing Commissioner under the Act and shall be continued in office on assignment to the agency in which then employed." This eliminates the political implications of a large number of reappointments of inexperienced personnel. See also the Administrative Court Bill, S. 2292.

20. Section 7441, Internal Revenue Code of 1954.

21. *United States* v. *Lee*, 106 U. S. 196, 220 (1882); see Commission Report on Legal Services and Procedures 15 (March, 1955).

the highest to the lowest are creatures of the law and are bound to obey it." Too often, the administrative agency or officer dealing with the substantive rights of the private citizen, nonfederal public body, or other entity seeks to exercise wide discretion without regard to the expressed will of Congress, by claiming that Congress intended an uncontrolled exercise of discretion and therefore an exception to the supremacy of the law. This tendency and other matters of general public knowledge through the press have created a noticeable loss of confidence in, and an increase in public apprehension toward, administrative government.

European Civil Code countries have a long and fascinating history connected with the conceptions of administrative law and procedure. Continental administrative law, whose strongest advocate was Napoleon, has for many years exceeded American efficiency in the development of a reliable administrative due process by the establishment of administrative courts.[22] Their purpose was not to usurp the executive power, but to preserve the finality of judicial power and to prevent political interference with that power by rule-making administrative agencies. A further purpose was to preserve from obscurity the proper separation of the legislative, judicial and executive functions of government.[23]

A Different System . . . le Droit Administratif

The existence in France of a body of administrative law (*le droit administratif*), separate and distinct from the civil law, dealing in the main with the competence of the administrative authorities and regulating their relations with one another and with private individuals, together with a separate and distinct body of tribunals charged with deciding controversies between the administration and private persons and of resolving conflicts of competence between the administrative and the civil courts, distinguishes fundamentally the administrative and legal system of France from that of Anglo-Saxon countries. In the latter countries there are, to be sure, well-settled rules of law and practice regarding the competence of the administrative authorities, the relations between them and private individuals and as to the responsibility of the state and its agents for injuries to private persons, but they do not constitute in their ensemble a separate and distinct body of law as the French *droit administratif* does.[24]

The principal object of the French administrative courts has been to protect private individuals against the arbitrary and illegal conduct of the administrative authorities and to insure reparation to those who have suffered injuries on account of the faults of those authorities. The degree of protection which it provides and the certainty of reparation which it assures are distinctly greater than that which is afforded by the law of any other country. It is to the Council of State that this situation is mainly due. For a long time the judicial courts were considered to be guardians of private rights, but this role has largely passed to the Council of State.[25] With small expenditure and without the necessity of employing an attorney, almost any citizen can go to the Council of State and secure the annulment of any illegal act (with a few trifling exceptions) of any administrative authority, whether it be that of the President of the Republic or a village mayor. The congested dockets of the Council and the thousands of cases which it handles every year afford evidence enough of its popularity.[26] The number of cases submitted to it has grown rapidly.

There are a few in France who criticize the whole system of administrative jurisdiction and maintain that it should be handed over to the ordinary judicial courts as in England and the United States,[27] but the existing system is approved and defended by the vast majority of French writers and jurists and all attacks against it have so far proved futile. There is little or no feeling in France that the system unduly protects the official class, that by subjecting functionaries and private individuals to different laws the latter are placed on a footing of inequality, that the administrative courts are the servile instruments of the government, and the like. The hundreds of decisions nullifying the acts of the government and condemning it to pay damages for its wrongful acts or requiring it to make claimed monetary awards is, in itself, a sufficient refutation of the charge that the Council of State lacks independence.

The difference between the Anglo-American and the French system of administrative law, so far as it concerns the organs in which the control of administrative action is vested, can be attributed to differing interpretations of the doctrine of the separation of powers. Of late there has been a tendency to overlook this necessity—to consider the separation of powers as an outmoded idea of the eighteenth century, "said to belong to the age of etiquette, the age of overrefinement, when every practical activity was embarrassed by checks".[28] Yet, as the British Committee on Ministers' Powers pointed out, this extreme view loses sight of the need for some distinction between the branches of government. "One of the main problems of a modern democratic state is how to preserve the distinction, whilst avoiding too rigid an insistence on it, in the wide borderland where it is convenient to entrust minor legislative and judicial functions to executive authorities."[29]

(Continued on page 486)

22. Leon Duguit, *French Administrative Courts*, 29 POL. SCI. QUART. 385. "To foreigners, and particularly to Anglo-Saxons, who are inclined to assume that the individual can be protected against the administration only by giving wide competence and strong organization to the ordinary courts of justice, the foregoing statements (*i.e.*, that France has unusually efficient protection against arbitrary administrative action) may seem paradoxical."

23. 30 HARV. L. REV. 430 (1917).

24. 33 YALE L. JOUR. 597 (1934).

25. Compare IDOUX, LA JURISPRUDENCE DU COUNSEIL D'ETAT ET DE LA COUR DE CASSATION QUANT AUX POINTS QUI LEUR SONT COMMUNS (1908) 11, 44.

26. The calendar of the Council for March 8 and 9, 1912, includes thirty-seven cases, embracing actions for the annulment of many ordinances of mayors, prefects, ministers and even of the President of the Republic; of decisions of educational authorities; ordinances of the Residents-General and Governors of various colonies; the decisions of various councils of prefecture and of departments; of commissions and councils of discipline; of the rector of the University of Algiers; etc.

27. For example, Saget argued in the Chamber of Deputies on July 5, 1920, that the system of administrative jurisdiction should be abolished and the *contentieux administratif* transferred to the judicial courts. "Justice rendered in the name of the French people", he said, "should not have two faces; we wish it to be one and independent. We think that the judicial courts alone, by reason of the irremovability of the judges and their method of appointment, are capable of giving sufficient guarantees to suitors, the guarantees to which they have a right." Quoted by J. Laferriere, 37 R.D.P. 553, note 1.

28. Pound, ADMINISTRATIVE LAW 45 (1942).

29. REPORT 4 (Cmd. 4060, 1932).

Midwest Regional Meeting

Will Be Held June 11-13 in St. Louis

The Midwest Regional Meeting of the American Bar Association will be held at the Sheraton-Jefferson Hotel in St. Louis on June 11-13. More than 1,000 lawyers, judges, law teachers and students from Arkansas, Illinois, Iowa, Kansas, Missouri, Nebraska and Oklahoma are expected. Appearing on the program will be Senator Sam W. Ervin, Jr., of North Carolina, and Kenneth C. Royall, of Washington, D. C. Senator Ervin will be the speaker at the principal banquet.

A highlight of this meeting will be a discussion on whether the Supreme Court's appellate jurisdiction should be curtailed. Senator Jenner, of Indiana has introduced a bill to limit the Court's appellate jurisdiction.

Mr. Royall will be one of the principals in the discussion. He will speak in opposition to Senator Jenner's proposal.

Mr. Royall is a partner in a law firm in Washington, D. C. He has served as State Senator of North Carolina in 1927, Undersecretary of War in 1945, Secretary of War in 1947 and Secretary of the Army from 1947 to 1949. During World War II he served on active duty as a Brigadier General.

The subject which will be discussed is not new. The Supreme Court has long been the center of storms of controversy. The earliest attack against the Court followed the decision in *Marbury* v. *Madison*, wherein the Court declared an act of Congress to be unconstitutional.

In recent years the Supreme Court has been the center of storms of controversy because of its decisions in the segregation cases and in such criminal cases as the *Jencks* case, the *Watkins* case, the *Mallory* case, the *Covert* and *Smith* cases.

The discussion of this current topic should prove interesting and thought provoking.

Senator Ervin will be the speaker at the meeting's main banquet on Friday evening, June 13. Senator Ervin received his LL.B. degree from Harvard Law School in 1922. He has been Judge of Burke County Criminal Court, Judge of the North Carolina Superior Court and Associate Justice of the North Carolina Supreme Court. He has been a United States Senator since 1954. Senator Ervin is a member of the Armed Services, Government Operations and Judiciary Committees. The Committee on Government Operations, under the chairmanship of Senator McClellan, has been much in the limelight during recent months.

The speaker at the Assembly Luncheon on Thursday noon, June 12, will be Carl F. Conway, of Osage, Iowa. Mr. Conway received his Juris Doctor degree from the University of Iowa in 1931 and is engaged in the general practice of law in Osage, Mitchell County, Iowa. He has acquired a well-earned reputation as an interesting and humorous speaker throughout the Midwest. Mr. Conway's topic will be "Observations of a Country Lawyer".

The Midwest Regional Meeting also will include programs by various Sections of the Association, including the Sections of Criminal Law; Insurance Negligence and Compensation Law; Real Property, Probate and Trust Law; Judicial Administration; Corporation, Banking and Business Law; and Bar Activities. There will also be a tax program in co-operation with the Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association. One or two other Sections also may sponsor programs.

For entertainment those who wish may attend the baseball game between the St. Louis Cardinals and the Cincinnati Reds on Wednesday night. On Thursday evening there will be a complimentary buffet supper on the stage of the famous St. Louis Municipal Opera. Tickets will be available for the musical production *Show Boat* that evening. There will be luncheons by law fraternities and the law school alumni associations on Friday noon.

All lawyers are invited to bring their wives as there will be special events for the ladies.

Southern Regional Meeting:

Atlanta, Georgia, February 19-22

The eighteenth Regional Meeting of the American Bar Association since the commencement of the present program in 1951 was held in Atlanta February 19-22, for lawyers in the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana and Tennessee. Paid registrations were slightly under 1500 lawyers, an attendance record equaled only by the 1954 Atlanta meeting.

Held immediately preceding the Annual Meeting of the Fellows of the American Bar Foundation and the Midyear Meeting of the House of Delegates of the Association, the Southern Regional Meeting also attracted an unusually large number of lawyers, judges, distinguished guests and their ladies from all sections of the country. This record attendance was a tribute to the extraordinary program developed by a strong and experienced leadership team composed of Honorary Chairman E. Smythe Gambrell, General Chairman William B. Spann, Jr., and Co-Chairmen W. Neal Baird, Griffin B. Bell and Robert R. Richardson.

In terms both of quality and variety, the program of legal seminars and workshops was almost comparable to an Annual Meeting. As Chairman Spann pointed out, the excellence of the program was due in major part to the splendid co-operation received from many of the Sections and Committees of the Association.

Outstanding Seminars and Workshops

While it is impossible, in a brief report on the meeting, to mention all of the seminar workshop sessions, a brief reference to several of these is merited. The Section on Judicial Administration, under the dynamic chairmanship of Mr. Justice Clark, conducted three outstanding programs. General David Sarnoff addressed one session on "The Layman Advises the Court". Another, conducted jointly with the Special Committee on Traffic Court Program, featured a film on "Procedure in the Traffic Courtroom". A record attendance of almost a thousand persons resulted, in part, from invitations extended to various interested lay groups in the Atlanta area.

The Section of Judicial Administration, in co-operation with the Attorney General's Conference on Court Congestion and Delay in Litigation, also arranged a fine presentation on "Court Congestion" which was moderated by Judge Lawrence Walsh, Deputy Attorney General of the United States, with distinguished participants including Judge Warren E. Burger; Judge Alfred P. Murrah; Leland Tolman; J. Lee Rankin, Solicitor General of the United States; Judge Nathan Cayton; and Assistant United States Attorneys General Victor R. Hansen, George Cochran Doub, Charles K. Rice and Perry W. Morton.

"Outer Space" Seminar

For the first time in the history of the American Bar Association, a major program was presented on "The Law of Outer Space". Sponsored jointly by the Sections of International and Comparative Law and Real Property, Probate and Trust Law, this fascinating session was presided over by former President David F. Maxwell, with speakers including Thomas E. Dewey, John Cobb Cooper, Frank Simpson III and Dr. Ernst Stuhlinger. The last named speaker, Chief of Research Projects of the Army's Ballistic Missiles Agency, accented the almost staggering problems of both international and private law which result from man's now apparent capability to occupy areas of outer space, both with manned and unmanned satellites or space vehicles.

Other highly successful workshop programs were conducted by the Sections of Corporation, Banking and Business Law; Criminal Law; Insurance, Negligence and Compensation Law; Labor Relations Law; Municipal Law; Patent, Trademark and Copyright Law; and Antitrust Law.

A number of Association Committees also presented interesting and well-attended programs. A highlight was that arranged by the Special Committee on Economics of Law Practice, under the Chairmanship of John C. Satterfield, which discussed such practical and immediate problems as "How To Fix Fees and Analyze Loss and Gain in Types of Practice" and "The Role of State and Local Associations in Improving the Economic Status of Lawyers".

Principal Addresses

An exceptionally high standard of performance marked the principal addresses delivered at the meeting. The first of these, by President Rhyne at the opening Assembly session, was a stirring presentation of his plan for "Law Day—U.S.A.", with well-docu-

mented reasons why the legal profession should fully support this occasion on May 1, 1958, which was officially designated by presidential proclamation. In urging public recognition of the importance of the "Rule of Law", President Rhyne said:

> These are days of soul-searching and re-evaluation of everything in our storehouse of strengths and weaknesses. The space age has brought a need for new scientific and technological concepts as new horizons are opened to the human race. Yet there is need to hold fast to certain fundamental concepts which are necessary to the preservation of individual freedom and free government—concepts which cannot be shaken by any contemporary influence. The rule of law is such an unshakeable concept.

John David Lodge, United States Ambassador to Spain, was the other principal speaker at the opening Assembly meeting. In a major address, obviously reflecting official policy, Mr. Lodge forcefully presented the urgency of certain legal aspects of American foreign policy.

Continuing this emphasis on the role of law in a rapidly shrinking world, Sir Leslie K. Munro, Ambassador from New Zealand and President of the General Assembly of the United Nations, addressed the main banquet which was attended by more than a thousand guests.

Hospitality and Entertainment

Atlanta's traditionally warm hospitality was much in evidence. The generous program of official entertainment included receptions by the Lawyers Club of Atlanta and the Georgia Bar Association, a dance at the Piedmont Driving Club sponsored by the Junior Bar Conference, and a delightful and elaborate program of luncheons, fashion shows and tours of Atlanta homes for the ladies. In addition to this organized entertainment, many members of the Atlanta Bar extended memorable personal hospitality to visiting lawyers, judges and their ladies.

Regional Meeting Program

This meeting at Atlanta was the second Regional Meeting held during the current bar association year, the first having been the Ohio Valley meeting in Louisville November 6-9. Although normally there are only two such meetings each year, a further Regional Meeting will be held in St. Louis on June 11-14. A preliminary announcement of the plans of this meeting indicate that it will continue the high level of performance established by prior meetings, which have attracted wide attendance from members of the profession who increasingly recognize that American Bar Association Regional Meetings provide a unique opportunity for both professional improvement and fellowship.

Notice of Election of Junior Bar Conference Officers

The annual election of officers and council representatives of the Junior Bar Conference for the year beginning with the adjournment of the Annual Meeting will be held in Los Angeles on August 25, 1958. Officers to be chosen are Chairman, Vice Chairman and Secretary. Representatives will be elected to the Council from the Second, Fourth, Sixth, Eighth, Tenth, and the Ninth and Tenth Circuits at Large.

Nominating petitions for each of the above positions must be submitted on or before June 16, 1958. Each petition shall be endorsed by at least twenty members of the Conference; endorsers of a nominee for the Council shall be residents of the circuit in respect to which the petition is submitted. Each petition shall contain a brief biographical sketch of the background and qualifications of the candidate.

Petitions for the three national officers shall be submitted to the National Chairman, Bert H. Early, 700 Chafin Building, Huntington 18, West Virginia, *and* to the National Secretary, Bryce M. Fisher, 730 Higley Building, Cedar Rapids, Iowa. Petitions for the council posts should be submitted to the respective incumbent council representatives and conformed copies shall also be forwarded to the National Chairman and Secretary. The incumbent council representatives for the circuits as to which vacancies must be filled are as follows:

Second—Arthur M. Lewis, 125 Trumbull Street, Hartford, Connecticut.

Fourth—R. Harvey Chappell, Jr., Mutual Building, Richmond, Virginia.

Sixth—Kennedy Legler, Jr., 1406 Third National Building, Dayton, Ohio.

Eighth—C. Paul Jones, 400 Courthouse, Minneapolis 15, Minnesota.

Tenth—Payne H. Ratner, Jr., 444 North Market, Wichita, Kansas.

Ninth and Tenth at Large—Richard C. Dibblee, Judge Building, Salt Lake City, Utah.

This notice is given pursuant to the provisions of Article III, Section 4 of the bylaws.

BRYCE M. FISHER
Secretary

Books for Lawyers

THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY. *By Roscoe Pound. New Haven: Yale University Press. 1957. $3.50. Pages 213.*

This new book contains both a lure and a challenge—*lure* for a refresher course in constitutional history, and *challenge* to keep aglow the sacred flame of freedom.

At this very appropriate time, the Yale University Press publishes the series of lectures delivered by Roscoe Pound at Wabash College in 1945. Having put down his notes for editing at a more convenient season, that indefatigable master of law and language, always on the move, could not turn back until after a dozen years, but, even now, publication comes when interest in the subject is higher and more important than usual.

Dividing the lectures into four periods, Dean Pound begins with a comprehensive definition of liberty, and gives two chapters to the development of constitutional guarantees in Medieval England and in the era of the Tudors and Stuarts. Then he shows the influence of that background on the developments in the American colonies down to the Declaration of Rights, and on through the formative era of written constitutions culminating in the federal bill of liberties.

To enable the reader to look at once to the sources discussed, the texts of many of the relevant documents, especially, Magna Charta and Coke's *Commentaries* thereon, other early declarations, quotations from landmark cases, and portions of Sir John Fortesque's monumental work *On Praises of the Laws of England*, are included in the eighty-page appendix, almost half the small volume, and a veritable storehouse of precedents.

After reminding of the two chief systems of law today, the modern Roman or civil law, which he describes as "characteristically administrative", and the English or common law as "characteristically judicial", the author follows the development of the common law from William the Conqueror to the Revolution of 1688, which caused a profound change in the English constitution that had been evolving step by step principally under the stamina and leadership of Edward Coke. Here, we read with inspiration, the extensive praise of him who "is generally regarded by lawyers as the oracle of the common law".

Professor Pound describes the progress of liberty in the American colonies and attributes much to the influence of Coke's *Institutes* and to the fact that the leading lawyers in America had been educated in England and were barristers of the Inns of Court. He traces vividly the inclusion in the colonial charters of the great principles of liberty which had been recognized in the mother country. These essentials of freedom, in one form or another, are taken as a matter of course today, but they represent the highest achievements in the science of government.

In this reviewer's opinion, Chapter 4 is the crowning glory of this gem-like treatise. It covers the critical period from the American Revolution to the Federal Constitution, includes references to the preservation of rights in each of the original state constitutions, and contains commentaries on the early pre-Marshall cases which established the principle of judicial refusal to sustain legislation repugnant to the Constitution. The doctrine of the separation of powers and the meaning of the "supreme law of the land" are discussed with the knowledge and insight of a scholar; the legal precepts in the Constitution are brought out so clearly that they suggest some newness of thought by the author; and, with the close of the book, the reviewer finds himself marveling how the dreams of aspirations of peoples, extending over half a thousand years, have crystallized, through struggles and vicissitudes, into law and order, principally by the combined wisdom and persistence of those who, with courage and sacrifice, have stood foursquare against autocracy and tyranny.

WALTER CHANDLER

Memphis, Tennessee

REFLECTIONS ON HANGING. *By Arthur Koestler. New York: The Macmillan Company. 1957. $4.50.*

Arthur Koestler is one of our most able polemists. He has embraced many causes and has invariably been extremely articulate and even vociferous in his efforts to impel others to do likewise. In the present volume he deals with capital punishment, to which he is inalterably opposed. The reasons which he advances for this opposition are persuasive, so persuasive that the book is said to have played a substantial part in effecting the virtual abolition of the death penalty in England where it was first published. But the fact remains that it is not, nor does it purport to be, an impartial presentation of the subject which it treats. It is the plea of a partisan on behalf of a cause of the justice of which he is convinced in advance. The basic assumption behind its argument is that all right-thinking people must agree as a matter of course, and only the recalcitrant, the misguided, or the uninformed need to be convinced.

Certainly Mr. Koestler can be forgiven his ardor. He has more than a passing interest in his subject, having himself been condemned to death on more than one occasion as a result of his political activities in various European countries. But to say that because the execution of political prisoners is indefensible the death penalty for crimes against society should be abolished in its entirety would certainly be a *non sequitur*. Not that Mr. Koestler makes any such argument explicitly; yet it is hard to believe that his personal experiences do not condition his thinking.

The point which he does make, and

to which he keeps returning, is that as the severity of the punishment imposed by the law has been lessened, the effectiveness of the law has not been diminished but increased. He notes that at the beginning of the nineteenth century, when a great many of what we would now call minor crimes carried the death penalty, the very businessmen and property owners for whose protection the laws had been enacted petitioned for their mitigation on the ground that "the archaic severity of the law made its enforcement impossible, and thus destroyed its deterrent effect; and that in the interest of public safety, milder punishments should be imposed." The justice of this comment as applied to the time when it was made cannot be doubted, but surely it does not follow that the milder the sanction the greater the deterrent, for otherwise the complete abolition of all forms of legal punishment would lead to Utopia. Short of the perfection of human nature, it is doubtful if this end can ever be accomplished.

Professor Cahn, however, who contributes what he calls a "Preface for Americans" to this volume, seems to feel that the America of today stands approximately where England stood more than a century ago. "The general inferiority of criminal justice in the United States", he writes, "has been notorious for generations. Despite minor reforms and advances here and there, our penal administration stands indicted as grossly deficient when measured against minimum standards". There is, of course, some justice to this criticism; but to say that the administration of criminal justice is inferior and therefore the punishments imposed should be lessened appears to lack something in logic. The more appropriate remedy would seem to be to improve the administration of criminal justice. At least this is the approach which the American Bar Foundation has taken through its Special Committee upon this subject and the vast research project now in progress under its guidance.

England, however, has seen fit to accept at least in part Mr. Koestler's and Professor Cahn's hypothesis. On March 21, 1957, a compromise bill became the law of that country under the terms of which capital punishment was abolished except in a very narrowly limited category of cases. Mr. Sidney Silverman, M.P., contributes to this volume an interesting afterword, written however before the final adoption and enactment of the bill, in which he traces its parliamentary background and history. But even more interesting is what has happened in England since its passage.

Based upon figures given in a news service story, during the first seven months murders were up an estimated 20 per cent. This means that if the trend was the same during the following five months, instead of the annual average of 120 to 140 murders which it has had in the past, the final figures will show that England had approximately 160 during the twelve months which ended March 21, 1958. The reason for this would require a closer analysis than can be undertaken here; but one factor which has been suggested is that the professional criminal whose record is such that he could hardly expect less than the maximum term of imprisonment if apprehended no longer has any incentive to eschew killing in order to avoid that apprehension.

In view of the fact that the bill was passed by a majority of only 286 to 262 by the House of Commons after being defeated in the House of Lords, it may be that the period of amnesty in England is nearing its end and repeal is in the offing. In any event, it would appear that the era of good will envisaged by Messrs. Koestler, Cahn and Silverman remains as far in the future as ever.

WALTER P. ARMSTRONG, JR.
Memphis, Tennessee

THE SANCTITY OF LIFE AND THE CRIMINAL LAW. *By Glanville Williams. New York: Alfred A. Knopf. 1957. $5.00. Pages xi, 350.*

This is the most significant book I have read in many years. It knifes straight to this century's greatest single embranglement, where to peg the value of life itself under the buffeting forces of a moral heritage that lags behind social fact and a scientific potential that runs just as far ahead.

The book treats the whole ambit of human life, from the sexual behavior which begets it through all its hurtles of continuation. We get an up-to-date accounting on birth control; we get data on sterilization, on artificial insemination, abortion, infanticide, suicide and euthanasia or mercy killing. We see all these examined under the cold white light of science, and then we see them examined under the more familiar torchlights of law and religion. Needless to say, the two views are not the same.

Man has been tinkering for a long time with the production lines of life, but we have now just about reached that point of scientific accomplishment when we could establish relatively foolproof controls, not only of our own numbers, but of our evolutionary destiny if we should see fit to try. First though, the question must be resolved whether all these available quantity and quality controls, starter buttons, shut-off valves and shaping devices can ever be squared with our religious and moral disciplines. Are such regulators as contraception, sterilization and artificial insemination compatible with our ideas of moral right and wrong? Put on a mass basis, the answer would be in the negative, but what of individual application? Is it wrong for a family of twelve to limit its further increases? Is it wrong for a childless couple wanting "one of their own" to pass the uncertainties of adoption in favor of artificial insemination, either with the husband's own semen or that of a suitably matched anonymous donor? If these things are wrong, then must it follow that it is right that the family of twelve should run on to a starving, ill-clothed and poorly educated fifteen? Is it right that the childless couple should go on through life longing for the one blessing it desires most and cannot have?

One sees in this book all the anathemas of modern civilization, and sees them through the eyes of one of the world's keenest observers. Glanville Williams, lawyer, professor and a Fellow of Jesus College, Cambridge, has long been one of England's greatest scholars and writers in the substantive law field. Here though, in a book for

lay readers, he has gone above law to fan out through social history, economic evolution, theology, medicine and the whole range of the sciences. The outgrowth of a series of James S. Carpentier Lectures delivered at Columbia University in 1956, the book is brilliantly written in a style that demonstrates a magnificent, almost incredible grasp of all the facets of society's greatest struggle with itself.

The theme revolves around what author Williams calls in his preface the conflict between the ideals of happiness and holiness, what I would prefer to call the awful incongruity of *is* and *ought* in today's society. We are not living in an altogether happy state of affairs; we never have, and I suppose we never shall. But we might be able, given a free hand, to adjust a bit, to alleviate here and there a particular *is* in our situation, if only the oracles of *ought* would let us. We have done it in other fields with some success, but when it comes to the most serious problem of all, life itself, we stand curiously helpless because too often the *ought* in no way answers the *is*.

Basically, we are people of abiding faith in traditional moral standards; on the whole, quite a commendable thing. Yet in application we sometimes carry that faith to ridiculous, even barbaric extremes. Thus we of the law solemnly tell the world it is right to marshal the full force of society to kill a person who has committed murder; and we say further that it makes no difference that he may be rather badly deranged mentally, so long as he can pass the *McNaghten* right-wrong test. We must not protect him; we must destroy him; and that is right. On the other hand, we tell the world it is wrong to hasten, even by a second, the peaceful end of another who writhes in the last consuming agonies of some inexorable disease. We must protect him; we must not punish him; to do so would be wrong. But whom are we really protecting and whom are we punishing in such self-righteous proclamations?

The greater curiosities though, are to be found in religion, particularly where sex is concerned. As Professor Williams remarks on page 48, "there seems to be something about the human reproductive system which throws the ecclesiastical mind off its balance". He cites particularly the Roman Catholic and the Anglican faiths. The Church of Rome takes the position, for example, that all abortion, including legal, therapeutic abortion is never permissible, even to save the life of the mother, because such action might bring about the death of a child without baptism. Yet the alternative of letting both mother and unbaptized fetus perish seems hardly better.

The Anglican Church is little better equipped dogma-wise to cope with its problems, which seem for the moment to center mainly around artificial insemination. On this subject, both the Anglicans and the Catholics show great discomfort, claiming that it is "unnatural", it contemplates masturbation for the production of the semen to be used, it works a technical adultery, the child it produces is conceived out of wedlock, etc. In Britain particularly, this battle has raged with mounting fury during the past two years, with the adultery issue finally going to trial early this year amid such mutterings as "it is not another man, but a test tube", and indignant references to "the surrender of a woman's reproductive organs to another man".[1] On a preliminary ruling that insemination by donor was not adultery,[2] the battle raged on into the House of Lords, with the ultimate in horrendums being thrown there by Lord Blackford, that if such practices are not stopped, some test-tube baby might some day come to sit in the House of Lords.[3] One must almost conclude with Professor Williams that "sectarian feeling probably runs higher on this [variety of 'adultery'] than on adultery of the old-fashioned type" (page 125). Yet it is a discouraging fact that in both Great Britain and in the United States, about one out of every ten couples desiring children cannot have them by natural means because of involuntary sterility in one or both spouses. Is it right or wrong for them to seek artificial means? Much has been written on artificial insemination in recent years, and much more will follow, but its treatment in this book is deserving of especial attention.[4]

The other parts of the book are just as engaging. Fetuses, monsters, corpses, eunuchs and witches all come forward to show their particular problems under law, religion and science. The alarming population increases in certain underdeveloped areas of the world are thoroughly studied, along with the even more alarming disproportionate rates at which the lower human elements are running far ahead of the higher in replacement, even in our own country. Every thinking American should read this book. It is colorfully written with just the right dash of sparkle and humor to hold all readers. Few will take any great comfort in it, because there is little comfort to be taken. It provides few answers, but the questions it raises in the sin versus science controversy are infinitely provoking, and infinitely important too, for all of us who live in a land of so much science and religion.

BEN F. SMALL
Indiana University School of Law

1. TIME, January 22, 1958, page 23.
2. By Roman Catholic Lord Wheatley, Judge of Scotland's Court of Session.
3. Carried on INS wire services, February 27, 1958.
4. Also recommended is the recent article by Arthur A. Levisohn, LL.B., M.D., *Dilemma in Parenthood, Socio-Legal Aspects of Human Artificial Insemination*, 4 JOUR. FORENSIC MED., 145 (1957).

TAXATION IN BRAZIL. *By Henry J. Gumpel and Rubens Gomes de Sousa. Boston: Little, Brown and Company. 1957. $10.00. Pages xxxii, 374.*

TAXATION IN MEXICO. *By Henry J. Gumpel and Hugo B. Margáin. Boston: Little, Brown and Company. 1957. $12.50. Pages xxviii, 430.*

For those who intend to keep on seeking a cure for our perhaps incurable tax complications, the efforts of other governments to maintain workable tax systems cannot fail to be worth studying—as they certainly are, also, for those whose clients have problems of foreign tax law. These two ably done books are parts of a World Tax Series prepared as a part of the program of the Harvard Law School International Program in Taxation, in consultation with the United Nations Secretariat. Contributions from the

Ford Foundation and from more than sixty-five business corporations have made the series possible.

Having in mind that one of our own best-known tax treatises, covering only our income tax, takes up more than thirteen large volumes, one can see what a problem was involved for the authors of these books. In addition to discussing taxes on income, they have to deal with the many other kinds of taxes imposed by these countries, and with the government setting in which taxes are imposed and administered. To summarize all this in several hundred pages for each of these countries has required keen selective judgment, since the tax laws there considered are nearly as complicated as ours, both in substance and in form.

The problems of tax policy in Mexico and in Brazil are much like those that have to be solved in the United States. All three countries have a variety of internal taxes at three levels — federal, state and municipal — and external taxes as well. The taxation systems of Mexico and Brazil show that they are the work of experts familiar with the systems of other countries. Their tax laws, like ours, are explicit rather than general in terms, but ours are in many respects radically different from theirs. So, also, are our methods of resolving controversies between taxpayer and Government.

In general, the Mexican and Brazilian governments rely more heavily than we do on revenue from excise taxes and other transaction taxes. Their taxes on income are nevertheless important sources of revenue, and each of these countries has an excess profits tax, which we do not have now. Their death duties are less severe than ours. In contrast with our system, quite a number of different types of income are taxed at different rates; income tax rates are, in general, lower than ours. Contrast with our taxing policies is also found in provisions as to interest, dividends, capital gains, non-recognition of gain, natural resources, and as to various other matters.

Administrative officials in those countries have greater powers of final decision than in ours. This is important because, no matter how detailed the text of a tax law is, any taxpayer engaged in a substantial business is likely to encounter a considerable number of twilight-zone income tax questions—either of fact or of construction—with the result that the amount of the taxpayer's actual tax burden may depend very importantly on the quality of judgment exercised by administrative officials. Results are quite likely to be influenced by public opinion toward what is called big business or toward foreign interests; and even well-qualified audit officials, naturally disposed toward an even-minded attitude, may be subject to pressure from above, tending to make them one-sided. All this is true in our own country as well as in others.

These and other human-equation considerations are beyond the scope of these two books, and for advice with reference to such practical matters, as well as on many technical points in the law, the taxpayer must place heavy reliance on lawyers practicing in the country which levies the tax and having day-to-day experience with construction of tax provisions and with tax administration—relying as well on a study of the actual text of the law. But if an outsider is to understand fully the information he gets from local experts, he must start with a considerable amount of over-all knowledge about the tax system he is studying. In line with the maxim which says that a man who intends to bring back gold from the Indies needs to carry gold with him on his journey, the outsider must know a good deal before he can properly interpret what the local experts tell him. These books are highly useful in supplying that need.

ROBERT N. MILLER
Washington, D. C.

PROXY CONTESTS FOR CORPORATE CONTROL. *By Edward R. Aranow and Herbert A. Einhorn. New York: Columbia University Press. 1957. $15.00. Pages xxiii, 577.*

This book is the first extensive treatment of the practical and legal aspects of proxy contests and the conduct of contested corporate elections. It is a thoroughly competent work by practicing attorneys who have called upon their experience in contests both on the side of management and for the opposition. They discuss controversial matters in an independent and objective manner.

The authors have surveyed here the Securities and Exchange Commission regulation of solicitations and the law relating to inspectors of elections, validity of proxies, cumulative voting, classification of directors and conduct of meetings. They discuss also the payment by the corporation of management and insurgent expenditures in contests.

Much of the material in the book had been published by the authors in four law review articles.

Sinclair Armstrong, former Chairman of the Securities and Exchange Commission, has contributed the introduction.

JAMES F. SPOERRI
Chicago, Illinois

Department of Legislation

Charles B. Nutting, Editor-in-Charge

Students of the legislative process have long been concerned with two major problems at the state level. One is the question of supplying competent staff assistance to the legislators. The other involves increasing popular understanding of the legislative function. The California program described here by Professor Lee seems to provide a happy solution to both.

The California Legislative Intern Program

By Eugene C. Lee, Assistant Professor of Political Science, University of California, Berkeley

A pioneer experiment in graduate training in the legislative process is being attempted in California, with the State Capitol replacing the college classroom, committee chairmen substituting for professors and legislative reports taking the place of term papers. The experiment, the California Legislative Intern Program, involves the assignment of advanced graduate students in law, journalism and political science as staff aids to officers and committees of the lower house of the California Legislature, the State Assembly, for a ten-month period of intensive full-time service. Academic sponsorship for the project is provided by the five academic institutions in California offering extended graduate work: the Claremont Graduate School, the University of Southern California, Stanford University and the University of California at Berkeley and Los Angeles. Students of other institutions are eligible to participate, as described below.

The program's purpose as set forth in a letter from University of California's President Robert G. Sproul to the Assembly Rules Committee, is "to provide training not only in the legislative process, but also in the general field of state government and public policy, for a small number of advanced students in political science, law and journalism. Another aspect of the program is to provide additional research service, through the interns, for state legislative leaders, selected standing and interim committees, and staff agencies of the Legislature."

The project is modeled after the highly successful Congressional Intern Program which has operated since 1953 under the auspices of the American Political Science Association. In the Washington program, five political scientists and five journalists are appointed each year for a period of nine months. The interns, generally young university instructors or working newspapermen, receive a $4,000 stipend, provided from foundation sources, and serve two successive four-month tours of duty as staff assistants to a member of the House of Representatives and to a Senator. A one-month intensive orientation program precedes the assignment to a legislative office.

The success of the Washington program and the keen competition for the appointments led many observers to speculate on the possible value of a similar experiment at the state level. In 1955, at a Conference on Streamlining State Legislatures held at the Berkeley campus of the University of California and jointly sponsored by the School of Law and the Department of Political Science, this possibility received formal recognition. Participants at the conference—legislators, journalists and lobbyists—cited the problem of inadequate staff assistance as one of the key shortcomings of the legislative process in the states. Correspondingly, university faculty in attendance indicated their desire to provide practical experience in the legislative process for qualified graduate students. It was the consensus of the Conference that a Legislative Intern Program, modeled after the congressional experiment, but tailored to the state scene would serve both of these needs.

During the ensuing year, faculty members of the University of California at Berkeley investigated the feasibility of the proposal. Working jointly with leaders in the Legislature, key legislative staff officers and representatives from the other graduate schools in the state, the broad outlines of the program were developed. A formal proposal was made to the Ford Foundation, requesting financial assistance, contingent upon the participation of one or both houses of the Legislature.

Under the plan finally approved by the several institutions, the Ford Foundation and the State Assembly, the Foundation agreed to provide $40,000 a year for a five-year period. This sum covers one half the cost of the stipend, which totals $400 a month, for a maximum of fifteen interns. The Ford grant also includes $10,000 for incidental costs of supervision and for partial support of a program of legislative research to be utilized by faculty and graduate students in the five participating institutions. The State Assembly, for its part, provides the remaining half of the interns' grant, a possible total annual obligation of $30,000, depending on the number of interns selected in any given year.

With formal acceptance of the program assured, an executive committee was established consisting of representatives from each of the five participating institutions and including as a regular member the Chairman of the Assembly Rules Committee, Los Angeles lawyer Allen Miller. The committee is headed by Professor Joseph Harris of the Berkeley Political Science Department and includes John Mc Donough of the Stanford Law School, John Vieg of the Department of Government at Claremont, Totten Anderson of the U. S. C. Political Science Department and Dean McHenry of the U.C.L.A. Political Science Department. Professor Eugene Lee of the Political Science Department at Berkeley was appointed faculty supervisor for the program and serves as secretary to the committee.

On the Assembly side, the important

Rules Committee assumed responsibility for the legislative aspects of the program, while H. E. Bachtold, Assistant to Speaker L. H. Lincoln, accepted the task of on-the-spot supervision of the interns and liaison with their legislative employers and the faculty supervisor.

Attention quickly turned to the recruitment of interns for 1957-58. Minimum qualifications were established requiring that all applicants be advanced graduate students or former students who had achieved equivalent experience in such fields as journalism. (It was anticipated that prospective law graduates would apply, planning to participate in the program following the State Bar Examination early in the fall.)

To complete the screening process, applicants still in the running were invited to appear in Berkeley for an intensive oral interview conducted by the program's faculty executive committee and several members of the Assembly Rules Committee. Eight interns were finally selected for duty at the State Capitol.

The program officially opened in Sacramento on September 3, 1957, with an orientation program, modelled after that conducted for new legislative personnel but adapted to the special needs of the interns. Visits to legislative and administrative offices in the Capitol featured initial remarks by key department heads and legislative personnel concerning the duties and activities of their respective agencies, followed by a question and answer period with the interns. The week-long program was high-lighted by a luncheon presided over by the Speaker of the Assembly and attended by the interns and their prospective legislative employers, each a chairman of an important Assembly committee.

Unlike their congressional counterparts, who are generally assigned to work in individual legislator's offices, the California interns in 1957-58 have been assigned to Assembly committees, with the exception of one intern assigned to the Speaker's Office. This results from the fact that, although California legislators have an unusually demanding schedule, few have an individual work-load as great as the typical Congressman. For example, the California Legislature is in session for only 120 days in odd-numbered years and thirty days in even-numbered years. Most Assemblymen and State Senators retain their pre-legislative occupation, albeit on a somewhat restricted basis, devoting only part-time to their duties as elected representatives. Correspondingly, the state legislators' demands for individual staff assistance to handle constituent mail, to trouble-shoot district problems with administrative departments, to draft speeches, prepare news releases and the like are considerably fewer than is true in Washington. Most state legislators in California do not attempt to maintain year-round offices, either in Sacramento or in the field, but attempt to work from their local private offices.

In contrast to this comparatively less-taxing *individual* legislative assignment, California legislative *committees* appear, relatively speaking, to be almost as active as do those at the national level. In the California Assembly, almost every standing committee continues its activities of investigation, research and report writing between sessions of the Legislature. These "interim committees" in the Assembly (twenty-five in 1957) had a total budget for the nine months period between the 1957-58 and 1958-59 sessions of $646,300.

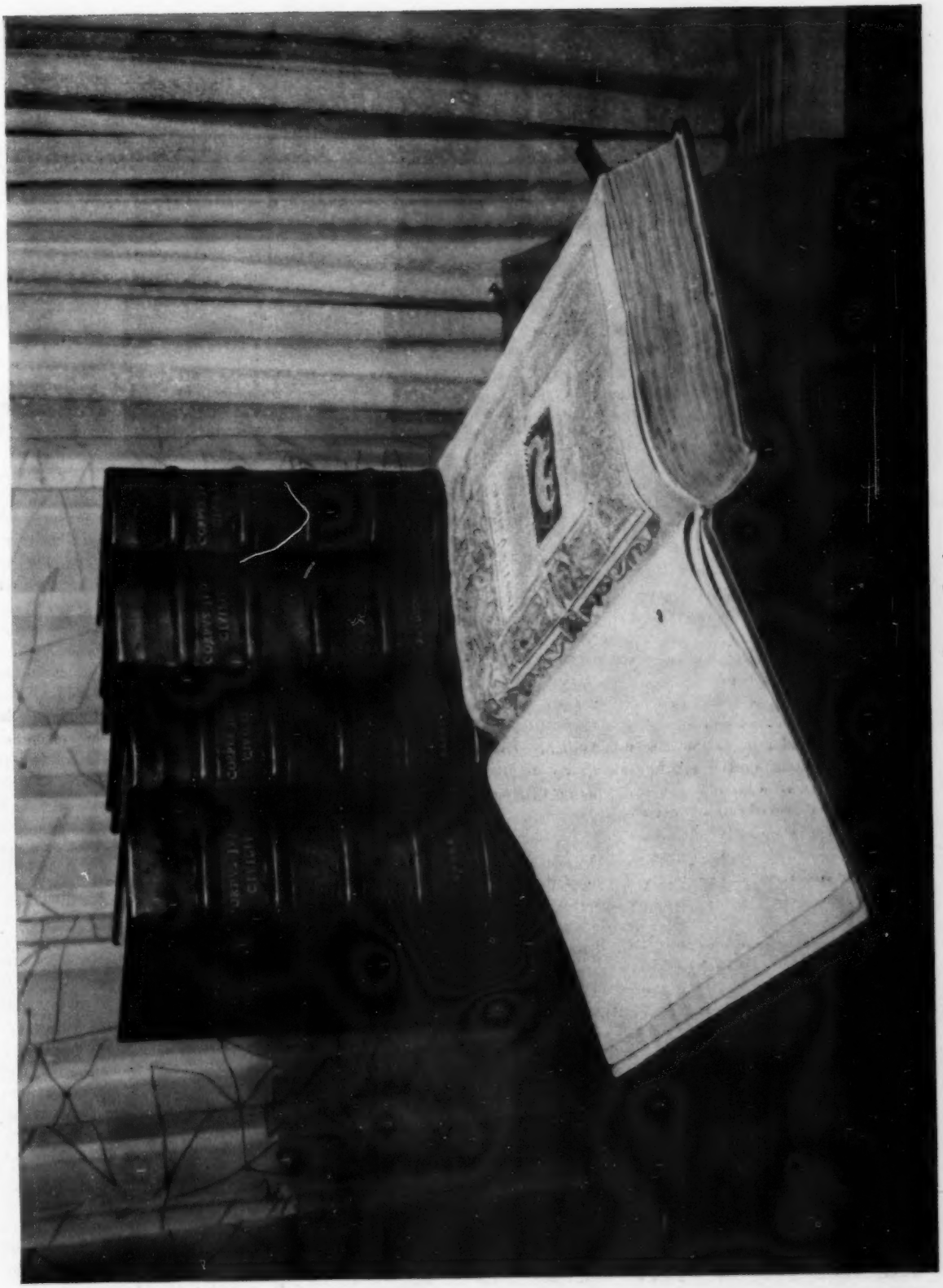
The net result of this relative lack of individual legislative work-load coupled with the steadily increasing scope and level of committee activity led, quite naturally, to the decision that legislative interns be assigned to interim committee chairmen. Although not precluded from performing individual services for the chairman, the intern's major assignment has developed into a combination of legislative research and report writing, arranging and organizing committee hearings, preparing briefing materials for committee members and handling press and public relations for the committee. Duty has not been restricted to Sacramento; on the contrary, almost every intern has been requested to travel with his committee in various parts of the state in the performance of the above activities.

The eight interns in 1957-58 include six men and two women and range in age from 24 to 33 years of age. Five of the group hold Master's degrees in political science and a sixth a Master's in journalism. Another, a graduate in Business Administration, qualified for the program by virtue of several years experience in full-time newspaper work, while the final member of the group is a graduate of the U.C.L.A. School of Law and a recent addition to the California Bar. The long-range objectives of the individual interns include college teaching, journalism, public service and public relations.

The assignments of the group have been equally varied and represent a broad cross-section of California legislative activity. Judiciary, Education, Revenue and Taxation, Conservation, Fish and Game, Manufacturing, Oil and Mining, and Rules comprise the committees to which interns have been appointed. An eighth intern is, as indicated above, assigned to the Speaker. During the session itself, interns will participate in yet another phase of the legislative process, serving on the floor of the Assembly as assistants to the several clerks of the chamber. These various assignments throughout the year are made by the Rules Committee after consultation with the faculty supervisor of the program.

Academic participation in the project is achieved in other ways as well. Once a week, the interns meet with the faculty supervisor in Sacramento to discuss their work, aspects of the legislative process, political and governmental developments in the state and similar matters. Legislative leaders, newspapermen, and lobbyists, have been invited to these seminar sessions to contribute off-the-record observations on legislative organization, procedures and politics and to subject themselves to what has proved to be intensive and leading interrogation. Prominent visitors such as the *New York Times*' William S. White have led discussions on the Washington scene, while the interns themselves called upon Congressman John Moss, a former Assemblyman, to compare practices in the House of Representatives and in the State Capitol. Visiting members

(Continued on page 483)



A rare edition of Justinian's Corpus Juris Civilis that was printed in 1575 in the original Latin text.

American Bar Association

Eighty-first Annual Meeting

First Announcement of Program, Los Angeles, California, August 25-29, 1958

The Assembly The opening Assembly session is scheduled for the Philharmonic Auditorium, Monday, August 25, at 10:00 A.M. The second session will be held Wednesday, August 27, at 10:00 A.M. and the third session on Thursday, August 28, at 2:00 P.M., in the Pacific Ballroom of the Hotel Statler. The Annual Dinner (fourth Assembly session) is scheduled to be held Thursday evening, August 28, at 7:30 P.M., in the International Ballroom of *The Beverly Hilton*. The fifth session will be held immediately following the final session of the House of Delegates Friday morning, August 29, in the Pacific Ballroom at the Hotel Statler.

House of Delegates The House of Delegates will meet in the Pacific Ballroom of the Hotel Statler at 2:00 P.M. Monday, August 25; 9:30 A.M. and 2:00 P.M. Tuesday, August 26; 9:30 A.M. Thursday, August 28, and 9:30 A.M. Friday, August 29.

Section Meetings

Administrative Law (Ambassador Hotel)
The Council will meet for luncheon at 12:30 P.M. followed by a meeting on Saturday and all day Sunday, August 23 and 24. Regular sessions of the Section will be held Monday afternoon, August 25, and all day Tuesday, August 26.

Antitrust Law (Ambassador Hotel)
Regular sessions of the Section will be held Monday afternoon, August 25, and Tuesday morning, August 26. The Tuesday morning session will be followed by a luncheon at 12:30 P.M.

Bar Activities (Hotel Statler)
The Committee on Award of Merit will meet all day Saturday and Sunday, August 23 and 24. A Council breakfast meeting has been scheduled for Sunday morning, August 24, at 8:00 A.M. A general session of the Section has been scheduled for Monday, August 25, at 2:00 P.M.

Corporation, Banking and Business Law (Biltmore Hotel)
Council meetings have been scheduled for Sunday morning, August 24 and Tuesday morning, August 26. A regular session of the Section has been scheduled Monday, August 25, at 2:00 P.M. On Tuesday, August 26, there will be a luncheon at 12:15 P.M. followed by an afternoon session to start at 2:00 P.M. The Division of Food, Drug and Cosmetic Law is planning to meet all day Tuesday, August 26, at the *University of Southern California*.

Criminal Law (Biltmore Hotel)
Regular sessions of the Section will be held Monday, August 25, at 2:00 P.M. and Tuesday, August 26, at 10:00 A.M. and 2:00 P.M.

Family Law (Biltmore Hotel)
Round table discussions are planned for Monday afternoon and all day Tuesday, August 25 and 26. A general meeting of the Section is scheduled for Monday, August 25, at 2:00 P.M.

Insurance, Negligence and Compensation Law (Ambassador Hotel)
The officers and members of the Council and Committee Chairmen will meet on Sunday, August 24, at 10:00 A.M. and 2:00 P.M. with a luncheon scheduled for 12:30 P.M. On Monday, August 25, there will be a breakfast meeting at 8:00 A.M. to be held by the Committee on Automobile Insurance Law. A luncheon is scheduled for Monday, August 25, at 12:00 noon. There will be a general session at 2:00 P.M. at which the Committee on Automobile

Insurance Law and the Committee on Aviation Insurance Law programs will be presented. Various Committee breakfast meetings have been scheduled for 8:00 A.M. Tuesday, August 26. At a general session of the Section at 9:30 A.M. on Tuesday, the Atomic Energy Liabilities program will be presented. At 2:00 P.M. on Tuesday there will be a business meeting and election of officers followed by the Atomic Energy Property Liabilities program. A reception at 6:30 P.M. and a dinner dance at 7:30 P.M. have been scheduled for Tuesday evening. A Section breakfast meeting sponsored by the Committee on Fidelity and Surety Insurance Law is scheduled for 8:00 A.M., Wednesday, August 27. The Trial Tactics panel and Life Insurance Law program will be presented at 9:30 A.M. on Thursday, August 28.

International and Comparative Law (Biltmore Hotel)
Council meetings have been scheduled for all day Sunday, August 24, and Tuesday, August 26, at 4:00 P.M. A joint breakfast with the American Foreign Law Association is scheduled for Tuesday, August 26, at 8:00 A.M. Regular sessions of the Section will be held Tuesday, August 26, at 9:30 A.M. and 2:00 P.M. A joint luncheon with the Junior Bar Conference is scheduled for Tuesday, August 26, at 12:30 P.M.

Judicial Administration (Hotel Statler)
A luncheon for Federal and State Judges will be held Monday noon, August 25, followed by a regular session at 2:00 P.M. The annual dinner in honor of the Judiciary of the United States is scheduled for Monday, August 25, at 7:30 P.M. The Law and Laymen's Conference will be held Tuesday morning, August 26. Regular sessions of the Section will be held Tuesday afternoon and Thursday morning, August 26 and 28.

Junior Bar Conference (Biltmore Hotel)
A meeting of the Committee on Award of Merit will be held Friday, August 22, at 9:00 A.M. The Board of Directors has scheduled a meeting at 2:00 P.M. on Friday. A candidates' reception and cocktail party will be held Friday at 6:00 P.M. The first general session is scheduled for 9:00 A.M. on Saturday, August 23, followed by a Conference Assembly at 9:15 A.M. A luncheon is being planned for Saturday at 12:00 noon. The Conference Assembly will meet again at 1:30 P.M. on Saturday, followed by a meeting of Circuit Caucuses of Conference Assembly Delegates at 5:00 P.M. A dinner dance will be held Saturday evening at 7:00 P.M. at *The Beverly Hilton*. The Resolutions, Nominating and Award of Merit Committee meetings are scheduled for 1:00 P.M. Sunday, August 24. A reception and cocktail party are planned for Sunday evening at 6:00 P.M. A luncheon is scheduled for Monday, August 25, at 12:00 noon to be followed by the second general session at 2:00 P.M. A debate and reception sponsored by the Conference on Personal Finance Law are scheduled for Monday afternoon, August 25. A joint luncheon with the Section of International and Comparative Law is scheduled for Tuesday, August 26, at 12:30 P.M. A meeting of the newly elected officers and Council members will be held Tuesday morning, August 26.

Labor Relations Law (Ambassador Hotel)
Council meetings are scheduled for Saturday afternoon and all day Sunday, August 23 and 24. Regular sessions of the Section will be held Monday afternoon, August 25, all day Tuesday, August 26, and Thursday morning, August 28. A luncheon has been scheduled for Tuesday noon, August 26.

Legal Education and Admissions to the Bar
joint sessions with
National Conference of Bar Examiners (Hotel Statler)
The Section Council will meet Friday afternoon, all day Saturday and all day Sunday, August 22, 23 and 24. The Board of Managers of the National Conference of Bar Examiners will hold a breakfast meeting Monday at 8:00 A.M. August 25. The Section will hold joint sessions with the National Conference of Bar Examiners at 2:00 P.M. Monday, August 25 and 10:00 A.M. Tuesday, August 26. A joint luncheon has been scheduled for 12:30 P.M. Tuesday, August 26. The annual meeting of the Section is scheduled for 2:00 P.M. Tuesday, August 26.

Mineral and Natural Resources Law (Hotel Statler)
Council meetings will be held at 4:00 P.M. Sunday, August 24, and 2:00 P.M. Wednesday, August 27. General sessions of the Section are scheduled for Monday afternoon and all day Tuesday, August 25 and 26. The Atomic Energy Committee of the Section is planning a breakfast meeting at 8:30 A.M. Tuesday, August 26.

Municipal Law (Biltmore Hotel)
The Council will meet at 5:00 P.M. Sunday, August 24, and 5:00 P.M. Tuesday, August 26. Regular sessions of the Section will be held Sunday afternoon, Monday afternoon and all day Tuesday, August 24, 25 and 26. A luncheon has been scheduled at 12:30 P.M. on Tuesday, August 26.

Patent, Trademark and Copyright Law (Biltmore Hotel)
A Council and Committee Chairmen meeting has been scheduled for Friday, August 22, at 8:00 P.M. A copyright symposium is being planned for Saturday, August 23, at 10:00 A.M. and a patent symposium at 2:00 P.M. the same day. There will be a reception and cocktail party Saturday at 6:00 P.M. An all-day trip to Catalina is being planned for Sunday, August 24, where a luncheon will be held for the United States Trademark Association at 12:15 P.M. followed by a trademark symposium at 2:00 P.M. The National Council of Patent Law Association breakfast is scheduled for Monday, August 25, at 8:00 A.M. General sessions of the Section are scheduled

for Monday, August 25, at 1:30 P.M., Tuesday, August 26, at 9:30 A.M. and 2:00 P.M. The International Patent and Trademark Association (A.I.P.P.I.) luncheon will be held Tuesday at 12:30 P.M. The annual dinner of the Section is scheduled for Tuesday, August 26, at 7:30 P.M. to be preceded by a reception and cocktail party at 6:30 P.M. There will be a general session Thursday, August 28, at 9:30 A.M. followed by a Council luncheon meeting at 12:30 P.M.

Public Utility Law (Ambassador Hotel)

The Council will meet at 2:00 P.M. on Sunday, August 24. Regular sessions of the Section will be held Monday afternoon and Tuesday morning and afternoon, August 25 and 26. A luncheon meeting for the Council members and guest speakers is being arranged for Tuesday noon, August 26. A reception and dinner dance will be held Tuesday evening, August 26. A Council luncheon meeting has been scheduled for Wednesday noon, August 27.

Real Property, Probate and Trust Law (Ambassador Hotel)

A Council meeting has been scheduled for Sunday, August 24, at 2:00 P.M. and a Council breakfast meeting at 8:00 A.M., Monday, August 25. A general session (Real Property Division) is scheduled from 1:45 to 4:30 P.M. Monday, August 25. There will be a breakfast meeting for officers, Council members and members of Section Committees at 8:00 A.M., Tuesday, August 26. A general session (Probate Division) is scheduled for 9:30 A.M. to 12:00 noon Tuesday, August 26. Another general session (Trust Division) is scheduled for 2:00 to 4:30 P.M., Tuesday. The Section dinner will be held at 7:30 P.M. on Tuesday, at the *Huntington Hotel*. There will be a breakfast meeting of the Council at 8:00 A.M., Wednesday, August 27.

Taxation (Hotel Statler)

The officers and Council will meet in executive session at 9:00 A.M. and 2:00 P.M. Thursday, August 21. There will be meetings of the Council and Committee Chairmen at 9:00 A.M. and 2:00 P.M. Friday, August 22. Business sessions will be held Saturday and Sunday, at 9:00 A.M. and 2:00 P.M., and Monday at 2:00 P.M. August 23, 24 and 25. A technical session is scheduled for 10:00 A.M. and a special session on state and local taxes for 2:00 P.M. Tuesday, August 26. Arrangements are being made for a reception and dinner dance Saturday evening, August 23, at the Palisades Country Club. Section luncheons are scheduled for Saturday and Sunday at 1:00 P.M. each day.

(The above programs are not in final form and are subject to change. The completed programs will appear in a later issue of the AMERICAN BAR ASSOCIATION JOURNAL and the program for the Los Angeles meeting which will be distributed to all members of the Association approximately thirty days prior to the meeting.)

Award of Merit Competition for State and Local Bar Associations

The American Bar Association's Section of Bar Activities has just announced that the 1958 Award of Merit Competition is under way. Entry forms may be obtained by writing Coordination Service, American Bar Association, 1155 East 60th Street, Chicago 37, Illinois. All entries must be postmarked by June 15, 1958.

The competition was established twenty years ago to pay special tribute to outstanding state and local bar associations. This year awards will be given in five divisions:

(1) State bar associations with more than 2,000 members.
(2) State bar associations with less than 2,000 members.
(3) City and county bar associations with more than 800 members.
(4) City and county bar associations with 100 to 800 members.
(5) City and county bar associations with less than 100 members.

All bar association officers are invited to publicize the contributions of their association to both the legal profession and the public by entering the competition. Awards will be made during a special ceremony at the opening of the 81st Annual Meeting of the American Bar Association in Los Angeles, California, on August 25, 1958.

Review of Recent Supreme Court Decisions

George Rossman
EDITOR-in-CHARGE

Antitrust law . . .
Robinson-Patman Act

Nashville Milk Company v. *Carnation Company*, 355 U. S. 373, 2 L. ed. 2d 340, 78 S. Ct. 352, 26 U. S. Law Week 4105. (No. 67, decided January 20, 1958.) *On writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Affirmed.*

Section 3 of the Robinson-Patman Act is not an amendment of the Clayton Act—by holding thus, the Supreme Court ruled out enforcement of that section of Robinson-Patman by a private suit for treble damages.

The petitioner alleged that unreasonably low prices in violation of Section 3 of the Robinson-Patman Act, 49 Stat. 1526, had injured it, and it filed this action for treble damages and injunctive relief under Sections 4 and 16 of the Clayton Act, 38 Stat. 730, 15 U.S.C. §§ 15, 26. The District Court dismissed on the ground that the private remedies of the Clayton Act cannot be based on a violation of Section 3 of the Robinson-Patman Act. The Court of Appeals affirmed.

The opinion of the Supreme Court was delivered by Mr. Justice HARLAN. The Court pointed out that Sections 4 and 16 of the Clayton Act permit private suits for injuries resulting from violations of the "antitrust laws" and go on to define antitrust laws as the Sherman Act, part of the Wilson Tariff Act, part of the Act amending the Wilson Tariff Act and the Clayton Act. The *expressio unius* rule, the Court reasoned, excluded the Robinson-Patman Act.

The Court refused to hold that Congress had made Section 3 of Robinson-Patman a part of the Clayton Act, pointing out that, while Section 1 of the Act expressly amends the Clayton Act, there is no such provision in Section 3 and it concluded that Congress might well have wanted to keep in the hands of public authorities enforcement of the "vague provision" of the Robinson-Patman Act aimed at selling "at unreasonably low prices for the purpose of destroying competition or eliminating a competitor".

The Court's examination of the legislative history convinced it that its interpretation was sound.

Mr. Justice DOUGLAS, joined by the CHIEF JUSTICE, Mr. Justice BLACK and Mr. Justice BRENNAN, wrote a dissenting opinion which read the legislative history as indicating that Congress intended to permit private actions to be brought to enforce Section 3. The treble-damage technique, the dissent argued, was intended to be an effective method of deterring violations of the antitrust laws. The Department of Justice has never enforced the criminal provisions of Section 3, the dissent noted, and as a result the Court has in effect repealed the statute if it is not available in civil proceedings.

The case was argued by Jerome F. Dixon for petitioner and by Melville C. Williams for respondent.

Antitrust law . . .
Robinson-Patman Act

Safeway Stores, Inc. v. *Vance*, 355 U. S. 389, 2 L. ed. 2d 350, 78 S. Ct. 359, 26 U. S. Law Week 4108. (No. 69, decided January 20, 1958.) *On writ of certiorari to the United States Court of Appeals for the Tenth Circuit. Judgment vacated and cause remanded.*

This was a companion case to No. 67; in this case the Court of Appeals had held that a private action would lie under Section 4 of the Clayton Act to enforce Section 3 of the Robinson-Patman Act. The complaint alleged sales "at unreasonably low prices" and price discriminations.

The Supreme Court, again speaking through Mr. Justice HARLAN, cited its decision in the *Nashville Milk Company* case, No. 67 *supra*, and ordered the complaint dismissed insofar as it rested on alleged unlawful selling at unreasonably low prices. The Court held that the respondent was entitled to a trial on the charges of unlawful price discrimination, since such violations are unlawful under the Clayton Act as well as the Robinson-Patman Act.

Mr. Justice DOUGLAS's dissenting opinion in No. 67, in which the CHIEF JUSTICE, Mr. Justice BLACK and Mr. Justice BRENNAN joined, was also attached to this decision.

The case was argued by John B. Tittman for petitioner and by Robert J. Nordhaus for respondent.

Antitrust law . . .
Robinson-Patman Act

Federal Trade Commission v. *Standard Oil Company*, 355 U. S. 396, 2 L. ed. 2d 359, 78 S. Ct. 369, 26 U. S. Law Week 4111. (No. 24, decided January 27, 1958.) *On writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Affirmed.*

By this decision, the Court wrote *finis* to litigation that has been in the courts for seventeen years. The question was whether certain discriminatory prices made by the respondent to some of its dealers fell within the exemption from the Clayton Act, provided by the Robinson-Patman Act, of discriminatory prices "made in good faith to meet a lawful and equally low price of a competitor". The Court upheld the Court of Appeals' decision in favor of the respondent.

The case had been before the Supreme Court in 1951 (340 U. S. 231), and at that time the Court remanded with instructions to the

Reviews in this issue by Rowland Young.

Federal Trade Commission to determine whether Standard's discriminatory prices were made to meet the equally low prices of its competitors. The Commission found that the discriminatory prices were made to meet competitors' prices, but held that Standard's reduced prices were made pursuant to a price system rather than being "the result of departures from a nondiscriminatory price scale", so that they were not reduced in good faith. The Court of Appeals could see no basis in the record for such a finding and held that Standard's good-faith defense had been established.

Mr. Justice CLARK spoke for the Supreme Court affirming. The Court refused to review the evidence any further, saying that the issue appeared to turn on a question of fact, and that a question of fact was one "which Congress has placed in the keeping of the Courts of Appeals". The Court noted that the Court of Appeals' findings accorded with those of the trial examiner, two dissenting members of the Commission, and another panel of the Court of Appeals when the case was in that court in 1949. The Court's examination of the record convinced it that the lower court had made a "fair assessment" of the record.

Mr. Justice DOUGLAS, joined by the CHIEF JUSTICE, Mr. Justice BLACK and Mr. Justice BRENNAN, wrote a dissenting opinion which argued that what Standard had done was to give lower prices to some favored retailers by labeling them "jobbers" when in fact they were not. The record plainly indicated a discriminatory pricing *system*, matching the "pirating offers" of Standard's competitors, said the dissent, and such a system is not a good-faith meeting of competition within the meaning of the Act.

The case was argued by Earl E. Pollock for petitioner and by Hammond E. Chaffetz for respondent.

Antitrust law . . .
Robinson-Patman Act

Moog Industries v. *Federal Trade Commission, Federal Trade Commission* v. *C. E. Niehoff and Company*, 355 U.S. 411, 2 L. ed. 2d 370, 78 S. Ct. 377, 26 U. S. Law Week 4115. (Nos. 77 and 110, decided January 27, 1958). *No. 77, on writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Affirmed. No. 110, on writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Vacated and remanded.*

The question here was whether a Court of Appeals has the authority to postpone operation of a valid cease-and-desist order of the Federal Trade Commission against one firm until similar orders have been entered against the firm's competitors. In two cases arising under the Robinson-Patman Act, the Eighth Circuit refused to hold the judgment in abeyance, while the Seventh Circuit directed that the effective date of the cease-and-desist order be delayed.

In a *per curiam* opinion, the Court held that the question was one for the exclusive decision of the Federal Trade Commission exercising its "specialized, experienced judgment".

Mr. Justice WHITTAKER took no part in the consideration or decision of the case.

The case was argued by Malcolm I. Frank for petitioner in No. 77, by Charles R. Sprowl for respondent in No. 110, and by Earl W. Kintner for the Commission.

Armed Forces . . .
type of discharge

Harmon v. *Brucker, Abramowitz* v. *Brucker*, 355 U. S. 579, 2 L. ed. 2d 503, 78 S. Ct. 433, 26 U. S. Law Week 4166. (Nos. 80 and 141, decided March 3, 1958.) *On writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Reversed.*

In determining whether a soldier is to receive an honorable discharge from the military service, the Secretary of the Army may consider only the soldier's military record, not his activities before entry upon active duty. In so deciding, the Court did not reach the petitioners' contention that issuance of less-than-honorable discharges to them constituted a denial of due process. Both the District Court and the Court of Appeals had dismissed the complaints on the ground that they had no jurisdiction to review the kind of military discharge awarded a serviceman.

The Supreme Court's *per curiam* opinion said that "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers. . . . The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers".

Turning to the merits, the Court noted that 10 U.S.C. § 652(a) provides that no person be discharged from military service "without a certificate of discharge" to be issued by the Secretary of the service. Section 693(h) provides for review of the Secretary's action by the Army Board of Review "based upon all available records of the [Army] relating to the person requesting such review. . . ." The Court construed the "records" referred to as "records of military service" and concluded that the type of discharge was to be determined solely on the soldier's military record. The Court pointed out that Army Regulations state that the purpose of a discharge certificate is to record the separation of the soldier from the military service and "to specify the character of service rendered during the period covered by the discharge".

Mr. Justice CLARK wrote a dissenting opinion that argued that Congress had not authorized judicial review of the award of military discharges. The dissent also disagreed with the Court's construction of Section 693(h), by which " 'all' is deemed to mean 'some' " records. "I would not require the Secretary to issue a discharge certificate which on its face falsifies the real grounds for its issuance", the dissent concluded.

The cases were argued by David I. Shapiro and Victor Rabinowitz for the petitioners and by Donald B. MacGuineas for the respondent.

Commerce . . .
Motor Carrier Act

Nelson v. *United States*, 355 U. S. 554, 2 L. ed. 2d 484, 77 S. Ct. 496, 26 U. S. Law Week 4136. (No. 16, decided March 3, 1958.) *On appeal from the United States District Court*

for the Northern District of Illinois. Affirmed.

Beer, wine, groceries, glue and automobile batteries are not "stock in trade of drug stores", at least not so far as the Interstate Commerce Commission is concerned, and the Supreme Court agrees.

The appellant, whose contract carrier permit had been issued under the "grandfather clause" of the Motor Carrier Act of 1935, was authorized to carry only "[n]ew and used store fixtures, new and used household goods, and stock in trade of drug stores" over irregular routes in ten states. An investigation by the Commission revealed that the appellant was carrying a wide range of commodities for many kinds of shippers, although the original application for a permit under the "grandfather clause" described appellant's operation as "transportation . . . of store fixtures and miscellaneous merchandise, and household goods of employes, for Walgreen Co., in connection with the opening, closing and remodeling of stores". The Commission issued a cease and desist order, and a three-judge District Court refused to enjoin enforcement of the order. The case went to the Supreme Court on direct appeal.

The Court's opinion was delivered by Mr. Justice CLARK. The Court refused to adopt the appellant's interpretation of the words in its permit, "stock in trade of drug stores", as meaning "goods such as are sold in drug stores". "It is obvious to us", said the Court, "that such a reading enlarges the ordinary meaning of the words", and the words have to be taken in the ordinary meaning in the absence of a patent ambiguity or a specialized usage in the trade.

Mr. Justice DOUGLAS dissented without opinion.

The case was argued by Paul E. Blanchard for the appellant and by Roger D. Fisher for the appellees.

Commerce . . . *state regulation of military shipments*

Public Utilities Commission of California v. *United States*, 355 U. S. 534, 2 L. ed. 2d 470, 77 S. Ct. 446, 26 U. S. Law Week 4140. (No. 23, decided March 3, 1958.) *On appeal from the United States District Court for the Northern District of California. Affirmed.*

In this decision, the Court struck down a California statute which required approval by the state's Public Utilities Commission of rates charged by common carriers for transportation of property of the Armed Forces.

The statute, Section 530 of the California Public Utilities Code, provided that "The commission may permit common carriers to transport property at reduced rates for the United States . . . to such extent and subject to such conditions as it may consider just and reasonable". Prior to 1955, the statute had provided that common carriers "may transport, free or at reduced rates . . . property for the United States. . . ." There is a large volume of military traffic in California, and the Government negotiates special rates with carriers which are substantially equal to or lower than those for regular commercial shipments. This was a suit filed in a three-judge District Court asking that Section 530 be declared unconstitutional. The District Court rendered judgment for the United States.

The Supreme Court, which delivered its opinion through Mr. Justice Douglas, was faced at the outset with the contention that it had no jurisdiction, the state arguing that there was no "actual controversy" between the United States and the Commission. To this the Court replied that the Commission had indicated its intention to enforce the statute and that the prohibition of the statute was "so broad as to deny the United States the right to ship at reduced rates, unless the Commission first gives its approval". This constituted, the Court declared, a present and concrete controversy; it also held that nothing in the Johnson Act, 28 U.S.C. § 1342, barred the grant of relief.

On the merits, the Court found that federal policy, as expressed in statutes and military regulations, provides for federal officers negotiating rates for shipment with discretion to determine when the existing rates will be accepted and when negotiations will be undertaken for lower rates. The California statute would, said the Court, permit exercise of this discretion only if the state commission approved, and this amounts to a prohibition on the Federal Government. "Here the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear", the Court declared, pointing out that state regulation might involve the Services in "an administrative morass" that would seriously interfere with national defense.

Mr. Justice HARLAN, joined by the CHIEF JUSTICE and Mr. Justice BURTON, wrote a dissenting opinion which argued that the Court was acting with "unnecessary haste" in striking down the California statute. The dissent argued that there was no clear congressional direction that state minimum price or rate regulation be by-passed. The California statute was aimed at rate-cutting practices that had a "seriously depressing influence upon revenues of carriers", the dissent argued, and in this view, the actual application of the state regulation should have been tested before the California Commission and the state courts before a final judgment was rendered.

The case was argued by J. Thomason Phelps for appellant and by John F. Davis for the appellee.

Commerce . . . *state discrimination*

Chicago, Milwaukee, St. Paul and Pacific Railroad v. *Illinois, United States* v. *Illinois, Interstate Commerce Commission* v. *Illinois*, 355 U. S. 300, 2 L. ed. 2d 292, 78 S. Ct. 304, 26 U. S. Law Week 4095. (Nos. 12, 27 and 28, decided January 13, 1958.) *On appeal from the United States District Court for the Northern District of Illinois. Affirmed.*

This case presented another example of the problem of "adjusting State and federal interests in the regulation of intrastate rates", and concerned an Interstate Commerce Commission order raising commuter fares on the Milwaukee Road's trains to the suburbs of Chicago.

In 1952, the railroad filed a petition with the state commerce commission seeking authority to curtail its commuter service in the Chicago area and to increase fares to end its out-of-

pocket losses in the operation of commuter trains. Before the state commission acted on the petition, the railroad changed from steam to diesel operation. The state commission found that the cost savings effected by this change eliminated the out-of-pocket loss, and it denied the application. In 1955, the railroad petitioned the ICC for a fare increase. After hearings, the ICC granted the increase, acting on authority of 49 U.S.C. § 13(4) which authorizes it to prescribe intrastate fares if it finds that ". . . any such [existing intrastate] fare . . . causes . . . any undue, unreasonable, or unjust discrimination against interstate . . . commerce". A three-judge District Court set aside the order, enjoined its enforcement and remanded the case to the ICC for further proceedings.

The Supreme Court's unanimous opinion affirming was written by Mr. Justice BRENNAN.

The Court said that the justification for the exercise of the extraordinary federal power to interfere with intrastate rates must be definitely and clearly apparent, and that the ICC should have taken into consideration the railroad's other intrastate revenues from Illinois traffic, freight and passenger. "A fair picture of the intrastate operation, and whether the intrastate traffic unduly discriminates against interstate traffic, is not shown, in this case, by limiting consideration to the particular commuter service in disregard of the revenue contributed by the other intrastate services", the Court declared. The Court conceded that it was desirable that each intrastate service pay its own way if possible, but remarked that the state commission, not the ICC, has the primary responsibility of achieving that end.

The case was argued by R. K. Merrill and Charlie H. Johns, Jr., for appellants and by Harry R. Begley and S. Ashley Guthrie for appellees.

Criminal law . . . *"tainted evidence"*

Lawn v. *United States, Giglio* v. *United States*, 355 U. S. 339, 2 L. ed. 2d 321, 78 S. Ct. 311, 26 U. S. Law Week 4087. (Nos. 9 and 10, decided January 13, 1958.) *On writs of certiorari to the United States Court of Appeals for the Second Circuit. Affirmed.*

These were income tax evasion cases in which the Court upheld the convictions of the petitioners over their contentions that the Government had used "tainted evidence" — evidence obtained in violation of their constitutional rights—in convicting them.

The petitioners testified before a grand jury in 1952 but were not warned of their constitutional privilege against self-incrimination. The grand jury voted indictments, but these were dismissed by the District Court on the ground that requiring the petitioners to appear and testify with their records before the grand jury without warning them of their consitutional rights violated the Fifth Amendment. In 1953, another grand jury voted the indictments which are at issue here. The petitioners contended that they were deprived of due process by the use of the "tainted evidence" obtained during the 1952 grand jury investigation in convicting them on the charges made in the second indictment. The Court of Appeals affirmed the convictions.

The Supreme Court's opinion was written by Mr. Justice WHITTAKER. The petitioners' first contention was that the District Court should have allowed them to conduct a full-dress hearing to determine whether material obtained from them in the 1952 grand jury proceeding or evidence derived from that hearing was considered by the second grand jury in 1953. The Court found no merit in this contention, holding that "an indictment returned by a legally constituted nonbiased grand jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment".

Petitioner Lawn objected to the admission in evidence against him of a canceled check for $15,000. He had produced the check before the 1952 grand jury, the United States Attorney had photostated it at that time, and apparently the photostat was inadvertently introduced in evidence at the 1953 trial. The Court found, however, that Lawn's attorney waived any objection to the introduction of the check, suggesting that he hoped to show that the check represented a legitimate loan instead of a share in the profits of the evasion.

Petitioners' third contention was that they were denied an opportunity to examine and cross-examine witnesses at the trial to determine whether the "tainted evidence" had been used by the prosecution at the 1953 proceeding. The Court said that its study of the record indicated that this contention was groundless, and the Court also referred to the record to demonstrate that the fourth and final contention, that the evidence was insufficient to support a conviction, was without merit.

Mr. Justice HARLAN, with whom Mr. Justice FRANKFURTER and Mr. Justice BRENNAN joined, wrote an opinion concurring in part and dissenting in part. This opinion disagreed with the Court's view of the $15,000 check introduced as evidence against petitioner Lawn, arguing that it was not at all certain that Lawn's attorney intended to waive his constitutional rights on this point. The Government maintained that the error, if any, was harmless because the Government had the same information from untainted sources which would have been presented if an objection had been made. The dissent would have remanded the judgment as to Lawn for a rehearing on this point in the District Court.

The case was argued by Milton Pollack and Joseph Leary Delaney for petitioners and by Roger Fisher for the United States.

Labor law . . . *certification*

National Labor Relations Board v. *District 50, United Mine Workers of America*, 355 U. S. 453, 2 L. ed. 2d 401, 78 S. Ct. 386, 26 U. S. Law Week 4129. (No. 64, decided February 3, 1958.) *On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Judgment vacated with instructions.*

The National Labor Relations Board had found the Bowman Transportation

Company guilty of unfair labor practices after it assisted District 50 of the United Mine Workers in order to defeat efforts of the Teamsters to organize its employees. The Board issued its usual cease-and-desist order directing the company to withhold recognition from District 50 until it received the Board's certification as the exclusive bargaining representative. However, District 50 was ineligible to receive the Board's certification since it had not complied with Sections 9(f), (g) and (h) of the Taft-Hartley Act, and as a consequence the company's employees might never have an opportunity to select District 50 as their representative. The Board denied District 50's application to delete the requirement for a Board certification. The Court of Appeals, when petitioned by the union, modified the order so that the company would be free to recognize District 50 either when certified by the Board or when that union "shall have been freely chosen" by the employees as their bargaining agent. The question in this case was the scope of the Board's powers under these circumstances, in view of its discretionary power under the statute to fashion remedies to dissipate the effects of an employer's unfair labor practices in assisting a union.

The unanimous opinion of the Supreme Court was delivered by Mr. Justice BRENNAN. The Court reasoned that the single purpose of Sections 9(f), (g) and (h) was "to stop the use of the Labor Board" by non-complying unions. There was nothing to compel the Board to insist upon a certification, the Court said, and thus deny the employees the right at an election to select the non-complying union as their representative.

The Court pointed out that the Board itself has drawn a sharp distinction between an employer-dominated union, which presumably would never be the free choice of the employees as their bargaining agent, and a union assisted but not dominated by the employer, which has a reasonable possibility of being the free choice of the employees. "The reason for the Board's certification requirement is to invoke the normal elector processes by which a free choice of representatives is assured", the Court said. Nothing in Sections 9(f), (g) and (h) prevents the Board from conducting an election not followed by a certification, since the Board's primary objective in these cases is to "demonstrate . . . [the assisted union's] right to be the exclusive representative of the employees . . ." said the Court.

Although it found that the Board's order constituted an abuse of its discretionary power, the Court found that the Court of Appeals had gone too far in its judicial review, and accordingly it returned the case to that Court with instructions.

The case was argued by Dominick L. Manoli for the petitioner and by Crampton Harris for the respondent.

Seamen . . .

Jones Act

Kernan v. *American Dredging Company*, 355 U. S. 426, 2 L. ed. 2d 382, 78 S. Ct. 394, 26 U. S. Law Week 4121. (No. 34, decided February 3, 1958.) *On writ of certiorari to the United States Court of Appeals for the Third Circuit. Reversed with instructions.*

In a limitation proceeding brought by the owner of a tug, the District Court denied the petitioner's claim for damages under the Jones Act. The petitioner's decedent lost his life on the tug in a fire that began when a kerosene lamp ignited inflammable vapors on the deck. The lamp was not more than three feet above the water level in defiance of a navigation rule that such lamps be maintained at a height of not less than eight feet above water level. The District Court found that the fire would not have occurred if the lamp had been at the proper level. The court, however, ruled that the violation did not impose liability because the purpose of the navigation rule had to do solely with navigation and had nothing to do with the safety of seamen. The Court of Appeals affirmed.

Mr. Justice BRENNAN delivered the Court's opinion reversing. The Court agreed with the lower courts on the general tort doctrine of the common law, but it saw in the Jones Act and the Federal Employers Liability Act a "general congressional intent . . . to provide liberal recovery for injured workers" in no way identical to the common-law doctrine which imposes liability for violation of a statutory duty only when the injury is one which the statute was intended to prevent. Here, said the Court, the defect in the lighting equipment resulting from the violation actually caused the death and the petitioner was entitled to recover.

Mr. Justice HARLAN, joined by Mr. Justice FRANKFURTER, Mr. Justice BURTON and Mr. Justice WHITTAKER, wrote a dissenting opinion which argued that neither the statute which was the authority for the navigation rule nor the Jones Act was intended to provide for liability without fault. The line of cases relied upon by the Court, in this view, was limited to questions arising under the Safety Appliance Act.

The case was argued by Abraham E. Freedman for petitioner and by T. E. Byrne, Jr., for respondent.

Taxation . . .

net worth prosecutions

United States v. *Massei*, 355 U. S. 595, 2 L. ed. 417, 77 S. Ct. 495, 26 U. S. Law Week 4171. (No. 98, decided March 3, 1958.) *On writ of certiorari to the United States Court of Appeals for the First Circuit. Affirmed.*

The Government need not prove the existence of a "likely source" of unreported income in a so-called "net-worth prosecution" for income tax evasion. In this brief *per curiam* opinion, the Court held that it was sufficient if the Government's case negatived all possible non-taxable sources of the alleged net worth increase. The Court of Appeals had remanded apparently on the assumption that "proof of a likely source" was an indispensable element of a net worth prosecution under *Holland* v. *United States*, 348 U. S. 121. The Court affirmed the judgment, however, since a new trial was permissible under the terms of the Court of Appeals' order.

Mr. Justice DOUGLAS noted that he would have affirmed the judgment on the opinion of the Court of Appeals.

The case was argued by Roger Fisher for the petitioner and by Richard Maguire for the respondent.

What's New in the Law

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Administrative Law . . .
interest conflict

Warning that administrative agencies which exercise quasi-judicial functions must maintain judicial-type independence, the Court of Appeals for the District of Columbia Circuit has vacated an order of the Civil Aeronautics Board because the counsel for one of the interested parties participated in the decision after his appointment to the Board.

The proceeding was an airline mail-pay case, to which the Postmaster General was a party, representing the Government. At the time the case was taken under advisement the then solicitor of the Post Office Department signed its brief. Later he was appointed to the CAB and participated in the decision adverse (three-to-two) to the airline. He also voted against reconsideration of the decision.

Said the Court: "The fundamental requirements of fairness in the performance of quasi-judicial administrative agency functions require at least that one who participates in a case on behalf of any party, whether actively or merely formally by being on pleadings or briefs, take no part in the decision of that case by any tribunal on which he may thereafter sit."

(*Trans World Airlines, Inc.* v. *Civil Aeronautics Board*, United States Court of Appeals, District of Columbia Circuit, January 23, 1958, Prettyman, J.)

Attorneys . . .
solicitation

Illinois lawyers geared into the Brotherhood of Railroad Trainmen's elaborate "regional counsel" system must discontinue their present connections or face the disciplinary consequences, the Supreme Court of Illinois has announced. The ruling came in a proceeding inspired by the Brotherhood's original petition in the Court for a declaratory judgment, but actually conducted on the Court's own motion in accordance with its inherent power to formulate and enforce standards governing the practice of law.

Upon instituting the proceeding the Court appointed one of its former justices as a special commissioner. He held a number of hearings, in which the Brotherhood, the Illinois State Bar Association, the Chicago Bar Association, and a group of railroads participated. Extensive testimony was taken; briefs were filed by all participating parties; the American Bar Association submitted an *amicus curiae* brief.

The undisputed facts showed that the Brotherhood maintains in Cleveland a "legal aid department" with which are associated sixteen lawyers (or firms) known as "regional counsel", selected for their ability and their location in a city where high verdicts may be obtained. Expenses of operation of the legal aid department and a portion of the cost of the Brotherhood's conventions are borne by the regional counsel.

Each local of the Brotherhood has an appointed person whose job is to make a report whenever a member is injured or killed in a railroad accident; he also sees the injured man or the decedent's family and tells them that they may obtain free legal advice from the regional counsel. He urges employment of the regional counsel, supplies blank contracts for his employment and escorts the prospective client to the regional counsel's office at the latter's expense. The investigator is also paid at his regular hourly rate for time spent in inquiring into the accident and bringing the injured man or his family to the office of the regional counsel. If he is employed, the lawyer is likely to pay the investigator a "gratuity".

Regional counsel charge a 25 per cent contingent fee, whether recovery is by settlement or litigation, which includes all expenses of investigation and litigation.

The Court felt that this picture was one of "active solicitation of . . . claims for particular lawyers who finance the solicitation" and declared that Illinois lawyers would have to discontinue their part in it. It rejected contentions that the practices were defensible because of the Brotherhood's representation of its members under the Railway Labor Act and the Labor-Management Relations Act. Those statutes, the Court said, were not intended to and could not "overthrow state regulation of the legal profession and the unauthorized practice of law".

The Court found the Brotherhood's policy argument more appealing. It agreed that railroading is a hazardous occupation, that claims agents of railroads have taken advantage of workers and that trainmen are entitled to "procedures that will insure that they receive competent legal advice for reasonable fees". These legitimate objectives can be obtained without lowering the standards of the legal profession, the Court said.

Accordingly, the Court declared, the union may maintain an investigative staff financed by the membership-at-large, with reports available to the injured worker or his survivors. The Brotherhood may also make known "the advisability of obtaining legal advice before making a settlement and . . . the names of attorneys who, in its opinion, have the capacity to handle such claims successfully".

But, it added:

> No financial connection of any kind between the Brotherhood and any lawyer is permissible. No lawyer can properly pay any amount whatsoever to the Brotherhood or any of its departments, officers or members as com-

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

pensation, reimbursement of expenses or gratuity. Nor can the Brotherhood fix the fees to be charged for services to its members. The relationship of the attorney to his client must remain an individual and personal one.

Giving the Brotherhood some time to reorganize its "legal aid department" operation, the Court ordered the standards outlined in its opinion to become effective on July 1, 1959.

(*In re Brotherhood of Railroad Trainmen*, Supreme Court of Illinois, March 20, 1958, *per curiam*.)

Civil Procedure . . . *discovery of documents*

The Supreme Court of Iowa has ruled that an insured suing his insurer in an excess-judgment action may have pretrial inspection of communications passing between the insurer and the lawyers hired by it to defend the insured.

The plaintiff contended that his automobile liability insurance company negligently and in bad faith failed to settle two cases against him within the policy limits. He requested pretrial inspection of "all letters, correspondence, reports, communications and copies of the same" in the insurer's possession relating to the previously tried cases. The insurer refused to produce on the ground that the communications between it and the attorneys who defended the suits were privileged.

The Court held that an attorney-and-client relationship existed between both insurer and insured and the defending counsel, and it applied a rule that "if it appears the secret or imparted communication is such that the attorney is under a duty to divulge it for the protection of the others he has undertaken to represent in the involved transaction, then the communication is not privileged". The Court rejected the insurer's argument that where two parties employ the same attorney the privilege disappears only if the communications are made by one party in the presence of the other or they are made with the intention that they be communicated.

"It would be shocking indeed", the Court declared, "to require an attorney who had assumed such a duty to act for the mutual benefit of both or several parties to be permitted or compelled to withhold vital information affecting the rights of others because it involves the informant." The rule of no privilege in such a case, the Court said, is based on "duty, loyalty and fairness, as well as on substantial public policy".

The insurer also attempted to rely on an Iowa rule denying the right of pretrial inspection of an attorney's work-product, but the Court said the rule was inapplicable because the communications requested related not to the instant case, but to other, and completed, cases.

(*Henke* v. *Iowa Home Mutual Casualty Company*, Supreme Court of Iowa, February 11, 1958, Larson, J., 87 N.W. 2d 920.)

Communications Law . . . *VHF or UHF*

A petitioner for a television broadcasting license has no right to complain that the Federal Communications Commission awards a UHF rather than a VHF channel as a result of the Commission's de-intermixture order removing the only VHF channel allocated to the petitioner's city. This is the decision of the Court of Appeals for the District of Columbia Circuit.

In its general allocations in 1952 the FCC gave Peoria, Illinois, two UHF and one VHF channels. After a comparative hearing the petitioner in the instant case got a construction permit for the VHF channel in 1956, but with provisions that construction should await the outcome of the Commission's de-intermix hearings (then just begun) and that the Commission might substitute another channel in place of that granted. The result of de-intermix was that the VHF channel was removed from Peoria and two additional UHF channels granted, of which one was substituted to the petitioner for its VHF channel. Not wanting the UHF channel, the petitioner asked the Court to restore the VHF channel or require the FCC to hold a full hearing with the burden on it of showing the need for the removal of the VHF channel.

But the Court refused to do either. Referring to its own decision in *Coastal Bend Television Company* v. *FCC*, 234 F. 2d 686, the Court repeated that it is the FCC's function to "pass on the wisdom of a channel allocation scheme", provided the decision has an adequate legal and factual basis. The Court found these bases present; there was no arbitrariness in removing the VHF channel from Peoria, it added.

Removal of VHF competition is a rational choice of means to achieve the goal of encouraging the development of UHF television broadcasting, the Court remarked. It emphasized that the petitioner's right to challenge the adjudicative proceeding, which granted the construction permit, and the rule-making proceeding, which resulted in the removal of the VHF channel, differed. It declared the petitioner got what it wanted—a TV channel—in the one, and the fact that it was a UHF channel—a "consolation prize"—was only the result of the Commission's acknowledged authority to act in the other.

(*WIRL Television Company* v. *U.S.*, United States Court of Appeals, District of Columbia Circuit, March 27, 1958, Burger, J.)

Criminal Law . . . *felony-murder*

Pennsylvania has retreated from the extension it recently added to the law of felony-murder. The Supreme Court of the state has now ruled that to qualify as a felony-murder "the killing must have been done by the defendant or by an accomplice or confederate or by one acting in furtherance of the felonious undertaking".

The case before the Court was the murder conviction of an armed robber whose co-felon was shot and killed by one of several police who were endeavoring to capture the robbers as the latter attempted to flee from the crime-scene. The conviction appeared supportable in the light of the Court's 1949 decision in *Pennsylvania* v. *Almeida*, 362 Pa. 596, and its later position in *Pennsylvania* v. *Thomas*, 382 Pa. 639. In the latter case the defendant was held answerable to an indictment for murder for the killing of his accomplice by the victim of their robbery. The necessary murder element—malice—had been imputed

to the defendant because of his contemporaneous participation in the initial felony.

In an opinion going back to Blackstone and examining the crime of murder in Pennsylvania, the Court has now reverted to the rule it has found existed in the state prior to *Almeida*. This requires the homicide to be the act of the accused during the commission of a felony, or the act of someone interested in or furthering the felony. Except for "shield" cases, where the malice is express and there is no need to impute it, the Court indicates there can be no felony-murder when the homicide results from action of someone opposed to the felonious act.

One judge concurred separately, but another dissented vigorously and lengthily, setting the tone of his dissent with this beginning sentence: "The brutal crime wave which is sweeping and appalling our country can be halted only if the courts stop coddling, and stop freeing murderers, communists and criminals on technicalities made of straw".

(*Pennsylvania* v. *Redline*, Supreme Court of Pennsylvania, January 10, 1958, Charles Alvin Jones, J., 137 A. 2d 472.)

Criminal Procedure . . . *jury handbook*

The Court of Appeals for the Seventh Circuit, gathered *en banc*, has retracted the unkind things it said last summer in *U.S.* v. *Gordon* (43 A.B.A.J. 941; October, 1957), about the Judicial Conference's "Handbook for Jurors", but only over the continuing protest of two judges who were part of the Court's original panel.

In *Gordon*, a panel consisting of Judges Major, Finnegan and Schnackenberg, held that a defense challenge to the venire, grounded on the theory that distribution of the jury handbook impinged on the defendant's right to a fair and impartial trial, should have been granted. This was in addition to a reversal on other, unrelated grounds.

At the Government's request the Court granted an *en banc* rehearing, confined to the handbook argument only. By the time the rehearing came on, Judge Major had retired; Judges Finnegan and Schnackenberg were the only members of the original panel left for the *en banc* Court.

Judge Parkinson, now writing for the Court, has held that a challenge to the venire can raise only the issue of the invalidity of the entire panel because of some vitiating defect or irregularity in selection or summoning. Thus, the Court has now declared, that motion could not raise the handbook issue, particularly because there was no evidence adduced that any member of the jury, although furnished with the handbook, had ever read it or had been influenced by it. Judge Parkinson admitted that this argument was first made by the Government at the rehearing; on the former appeal it had admitted that the motion reached the handbook issue and it had argued in defense of the quality of the book and the propriety of its distribution.

With this new disposition of the jury handbook question, Judge Hastings and Chief Judge Duffy have agreed, the latter concurring separately with a spirited defense of the handbook. But Judges Finnegan and Schnackenberg remain unreconstructed. They both filed dissenting opinions holding to the criticisms of the handbook detailed by Judge Major in the former opinion.

(*U.S.* v. *Gordon*, United States Court of Appeals, Seventh Circuit, February 19, 1958, Parkinson, J.)

Divorce . . . *posthumous widowhood*

A Chicago woman has proved, with the help of the Supreme Court of Illinois, that when it comes to divorce a woman can have her cake and eat it too. By vacating a previous divorce decree, the Court has made her a legal surviving spouse.

It all came about rather bizarrely. The widow was married to husband one in December, 1953. In July of 1955 she won a divorce plus property settlement on the ground of habitual drunkenness for two years, despite the fact that she had been married only nineteen months. Came August of 1955 and she married husband two. This lasted until June, 1956, when, at the suit of husband two, the marriage was annulled on the ground that the wife's divorce was void because the court had no jurisdiction to grant a divorce on less than two years' habitual drunkenness.

Then things thickened. In August of 1956, husband one died, an event entitling a surviving spouse to considerable wealth. In the same month she commenced an action to vacate the divorce, using its voidness (as already determined in the annullment action) as reason. The deceased husband's brothers opposed the vacation.

The trial court granted her petition, but on appeal the intermediate appellate court reversed, reasoning that since the court in the original divorce action had jurisdiction of divorce cases, its decision, while erroneous, could not be disturbed after the passage of thirty days from the entry of the decree and that she had obtained in the divorce suit all the relief she had sought, barring her from later contesting the decree.

But the Supreme Court in turn reversed, reinstating her as the widow of husband one. It ruled that the divorce court had no jurisdiction whatsoever since the complaint showed on its face that the parties had not been married two years. A void decree, the Court continued, could be attacked anytime. Otherwise, the Court said of the quandried woman: "If she cannot attack that decree, she is both single and married, for all practical purposes."

The Court conceded that courts will not extend their aid to parties in *pari delicto*, but in a divorce case, it added, the state is a "third party" and it is interested in the "protection of the marriage relation and the welfare of society".

An attempt by the brothers to work an estoppel theory against the widow was rejected by the Court. Estoppel operates only as to the parties, it said; therefore the brothers stood in the position of the deceased husband. "Nothing in this record", the Court remarked accordingly, "indicates otherwise than that the parties to the divorce decree, if all were alive, could and would be restored to the exact status that existed before the divorce, both personally and as respects their property interests."

(*Collins* v. *Collins*, Supreme Court of Illinois, March 20, 1958, Hershey, J.)

Fair Trade Laws . . . *continued activity*

Despite the abandonment by some manufacturers of price-fixed resale arrangements, activity continues on the fair-trade front. The Court of Appeals for the Second Circuit has affirmed the major provisions of a contempt order against a discount house that violated a consent decree, entered by a federal court in a diversity suit brought under the New York Fair Trade Law. Meanwhile, the Supreme Court of Ohio has invalidated the non-signer provision of the Ohio Fair Trade Act.

In the Second Circuit case a consent decree had been entered forbidding the discount house from advertising or selling the manufacturer's price-fixed products below the established retail list price. Shortly thereafter the discounter made sales below those figures.

Rejecting defenses, the district judge entered a judgment requiring the discount house to pay the manufacturer $1,000 as a "fine", reimburse the manufacturer $2,500 for attorneys' fees and costs of the litigation and pay a "fine" of $2,500 for every future sale in violation of the consent decree.

The Second Circuit affirmed, except as to the $1,000 "fine". Writing the judgment of the Court, Judge Hincks declared that a civil contempt proceeding is remedial and compensatory, and that an award or "fine" must compensate the injured party for a loss and is based on the injurer's profits from its wrongful conduct. Applying these standards, he held that the $1,000 "fine" could not stand in view of the tenuousness of the injury to the manufacturer and the impossibility of determining the discount house's profits, because it had destroyed the records showing the amount it paid for the merchandise.

Concurring specially, Judge Hand agreed with this disposition, but only on the ground that the defendant's profits were not ascertainable.

The third member of the panel, Judge Lumbard, would have let the $1,000 "fine" stand with the other provisions of the district court's order, on the ground that the defendant could not complain of a reasonable estimate when it had itself destroyed the pertinent records.

(*Sunbeam Corporation* v. *Golden Rule Appliance Company, Inc.*, United States Court of Appeals, Second Circuit, January 30, 1958, Hincks, J.)

In the Ohio case the Court made short shrift of the non-signer provision of the state's fair-trade law. It ruled that it was an unconstitutional exercise of the police power "in that there is no substantial relation to the public safety, morals or general welfare". In addition, the Court continued, it transgressed the due-process clause of the Ohio Constitution "by arbitrarily and monopolistically denying a seller, who has not entered into any price-fixing contract with the manufacturer, the privilege of disposing of his own property on terms of his own choosing, and in addition delegates legislative power and discretion to private persons".

One judge, concurring, would not have reached the constitutional questions. He considered that the document relied on in the case was not a "contract", because lacking in consideration, and that therefore the non-signer section, which speaks of a contract, was not involved.

(*Union Carbide & Carbon Corporation* v. *Bargain Fair, Inc.*, Supreme Court of Ohio, January 22, 1958, Zimmerman, J., 147 N.E. 2d 481.)

Insurance Law . . . *public conveyances*

The Supreme Court of Minnesota has held that a part-owner of a small taxicab company did not lose insurance coverage on his private automobile when he used it to transport customers on one trip because no cabs were available.

The insured was a partner in a taxicab business which had four cabs. The company received a call for a cab; one was dispatched, but it had a flat tire en route. There were no other cabs available and the insured, since he was about to go home anyway, took the fare in his personal automobile. An accident occurred during the trip. The insurance company contended it was not liable because of a provision excluding use of the insured's automobile as a public or livery conveyance.

The Supreme Court could not agree with this argument. It said that the exclusionary clause related to a use in which the vehicle is "generally available" to the public. Examining the few cases in the field, the Court noted that the payment of money is not a controlling factor, and it therefore found it immaterial whether the insured intended to charge for the trip.

The insurance company also argued that in effect the private automobile was substituted for a taxicab and accordingly became a public or livery conveyance. But the Court declared that "one isolated instance" would not convert a private car into a public conveyance.

(*St. Paul Mercury Indemnity Company* v. *Knoph*, Supreme Court of Minnesota, January 31, 1958, Dell, J., 87 N.W. 2d 636.)

Personal Property . . . *historical documents*

The Court of Appeals for the Eighth Circuit has agreed with a district court ruling that the United States has not established paramount title to sixty-seven documents prepared by Captain William Clark, second-in-command of the Lewis and Clark Expedition.

The documents, a series of original writings (almost entirely in Clark's handwriting) on scraps of paper, were found in a desk in the attic of a St. Paul, Minnesota, house when the owner of the house, Mrs. Sophia V. H. Foster, died in 1952. The desk had belonged to Mrs. Foster's father, General John Henry Hammond, who died in 1890. None of these persons was related to Clark. The whereabouts of the documents had been unknown for almost 150 years.

Mrs. Clark's executor brought a suit to quiet title to the documents in itself. It joined the Minnesota Historical Society, which claimed a lien for collating and transcribing the documents, and some descendants and collateral relatives of Mrs. Foster, who asserted ownership in various ways. The United States intervened, claiming paramount title on the ground the documents were an official work product of an official governmental project. The district

court turned down the claim.

Affirming, the Eighth Circuit agreed that the expedition was a governmental project and that President Jefferson had instructed Captain Meriwether Lewis to record a vast amount of material, but it declared the trial judge was not "clearly erroneous" in finding that the Clark papers were personal.

(*U.S.* v. *First Trust Company of St. Paul*, United States Court of Appeals, Eighth Circuit, January 23, 1958, Vogel, J., 251 F. 2d 686.)

Segregation . . . *registrar's office*

A Louisiana Negro lawyer has been upheld by the Court of Appeals for the Fifth Circuit in a class-suit aimed at eliminating segregation of Negroes in a parish registrar of voters' office.

A class action under Rule 23(a) of the Federal Rules of Civil Procedure, the suit was brought under the Civil Rights Acts, 42 U.S.C.A. §§1981 and 1983 and 28 U.S.C.A. §1343. It alleged that the lawyer, on behalf of a Negro client, went to the office of the parish registrar of voters and was told by her that only white persons were waited on in her office and that her assistant took care of colored people in another room. The complaint asked $25,000 damages.

The district court had dismissed the action, construing it as a suit for damages for interference with the right to practice law, which, it held, was not a right protected by the Civil Rights Acts.

The Fifth Circuit ruled this construction of the complaint wrong. It said the complaint stated a cause of action based on the operation of an official office in such a manner as to deny to the plaintiff and other Negroes rights guaranteed under the Constitution and federal laws.

Remarked the Court:

> Having decided, as we have, that Harris County, Texas, may not operate a segregated cafeteria, *Derrington* v. *Plummer*, 240 F. 2d 922; that St. Petersburg, Florida, may not operate a segregated swimming pool, *City of St. Petersburg* v. *Alsup*, 238 F. 2d 830; and the Supreme Court having decided that the City of Atlanta may not operate a segregated golf course, 350 U.S. 877, it is too plain for argument that Ouachita Parish, Louisiana, may not, through its registrar of voters, operate a segregated registrar's office.

As to damages, the Court declared that the plaintiff could not have them augmented by any failure to obtain relief for his client. "Any damages to which he might be entitled are those to which any member of the class he represents would be entitled, in light of the circumstances, by reason of the alleged illegal segregation applicable to all Negroes", the Court said.

One judge dissented.

(*Sharp, Jr.* v. *Lucky*, United States Court of Appeals, Fifth Circuit, February 25, 1958, Tuttle, J.)

What's Happened Since . . .

■ On March 3, 1958, the Supreme Court of the United States:

REVERSED (8-to-1, with *per curiam* opinion) the decision of the Court of Appeals for the District of Columbia Circuit in *Harmon* v. *Brucker*, 243 F. 2d 613 (43 A.B.A.J. 352; April, 1957), and ruled that federal courts have power to review the type of discharge issued to particular members of the Armed Forces and to direct changes.

DENIED CERTIORARI in *Shapiro, Bernstein & Company, Inc.* v. *Goody*, 248 F. 2d 260 (43 A.B.A.J. 1124; December, 1957), leaving in effect the decision of the Court of Appeals for the Second Circuit that the retailer of pirated phonograph records may be subjected by the copyright owner to the same liability as the manufacturer of the records.

DENIED CERTIORARI in *Riggall* v. *Washington County Medical Society*, 249 F. 2d (44 A.B.A.J. 171; February, 1958), leaving in effect the decision of the Court of Appeals for the Eighth Circuit that a medical society's denial of membership to a licensed physician does not violate antitrust laws because the practice of medicine is neither trade nor commerce and the complaint did not allege an economic burden on the public resulting from the denial of admission.

DENIED CERTIORARI in *Milom* v. *New York Central Railroad Company*, 248 F. 2d 52 (44 A.B.A.J. 65; January, 1958), leaving in effect the decision of the Court of Appeals for the Seventh Circuit that the evidence of a railroad's negligence in furnishing allegedly defective ice tongs to an FELA plaintiff was not sufficient to warrant submitting the case to a jury, and that the trial court should have directed a verdict for the defendant.

DENIED CERTIORARI in *Jedwabny* v. *Philadelphia Transportation Company*, 135 A. 2d 525 (44 A.B.A.J. 261; March, 1958), leaving in effect the decision of the Supreme Court of Pennsylvania that a trial court properly awarded a new trial in a negligence case in which a lawyer continued to represent the three plaintiffs after one of them had been joined as a defendant by counter-complaint of the defendant.

DENIED CERTIORARI in *Williams* v. U.E., 248 F. 2d 492 (43 A.B.A.J. 1126; December, 1957), leaving in effect the decision of the Court of Appeals for the Ninth Circuit that the United States is not liable under the Federal Tort Claims Act for personal injuries resulting from a soldier's unauthorized and negligent operation of an Army truck while away from his base on a personal pleasure pass.

DENIED CERTIORARI in *Allen* v. *County School Board of Prince Edward County*, 249 F. 2d 462 (44 A.B.A.J. 173; March, 1958), leaving in effect the decision of the Court of Appeals for the Fourth Circuit that petitioning Negroes in a Virginia school district were entitled to a decree requiring the local school board to make "a prompt and reasonable start" toward compliance with the Supreme Court's decision on public-school segregation, and that the district judge was in error in refusing to fix a time limit or limits for an end of segregation on the basis of race, despite threats of increased racial tension and the possibility that such an order might result in the closing of schools.

BAR ACTIVITIES

A. Hulme Nebeker

The Tenth Annual Meeting of the Interstate Bar Council, a regional meeting of delegates from the bar associations of the eleven Western states and Alaska and Hawaii was held February 28, 1958, in San Francisco, California, at the Clift Hotel. The State Bar of California and its President, Edwin A. Heafey, of Oakland, were the hosts for the meeting, ably assisted by Jack A. Hayes, Secretary, in handling the arrangements.

William Hedges Robinson, Jr., of Denver, Colorado, President of the Council, presided.

The meeting is customarily held following the Midyear Meeting of the House of Delegates of the American Bar Association, allowing sufficient travel time for the delegates from the West to attend. Each member group is permitted three delegates, and these largely consist of current presidents, past presidents and governing board members. Nine state bar past presidents, eight current presidents, and four past presidents of the Interstate Bar Council were in attendance. A total of thirty-five delegates attended, most of them accompanied by their wives. President Robinson was host at a cocktail party for all on the evening preceding the meeting. State Bar of California President Heafey was the host at the cocktail hour in the Mills Tower Lounge of the Bar Association of San Francisco at the conclusion of the meeting.

A report of bar activities for the past year was made by each state followed by a lively question and answer period. The highlight of the meeting was the report made by President Heafey of the work of the lecturers in connection with the continued legal education program, handled through the extension facilities of the University of California in collaboration with the State Bar. A sound picture showing the techniques of a typical pretrial conference, made by them, was shown.

Council officers for the ensuing year elected were: President: A. Hulme Nebeker, Salt Lake City, Past President, Utah State Bar; Vice President: H. Baird Kidwell, Honolulu, President, Bar Association of Hawaii; Secretary: John H. Holloway, Portland, Secretary, Oregon State Bar. Continued as Chairman of the Council Liaison Committee with the American Bar Association, Its Sections, Committees and Other Groups, was John Shaw Field, of Reno, Nevada, former Council President.

In the discussion of a place for the 1959 Meeting, a majority favored holding it in Honolulu, Hawaii, if an invitation from the Bar Association of Hawaii is received.

The Florida Bar has received the Freedoms Foundation Thomas Jefferson award for the best community program carried on in the nation by a non-profit organization. The award consisted of $1,000 and a gold George Washington medal. The entry, "Speak Up for Freedom", represented the work done by the American Citizenship Committee during recent years. The American Citizenship lectures written by members of The Florida Bar have been delivered in over one third of Florida's high schools by lawyers who volunteered to speak at assemblies. The program has been conducted with the earnest co-operation of the State Department of Education, principals, teachers and students.

At the 1957 Annual Meeting of the American Bar Association in New York City, the Committee on Awards of Merit cited for honorable mention "The Florida Bar—for its American citizenship program of lectures by bar members to high school students, including an officially approved lecture on 'The Meaning of Communism' and for its successful support of the Florida court reorganization program approved by the voters in a recent statewide referendum".

An attractive and compact booklet, entitled "The Public and Professional Responsibilities of Lawyers and Judges in Colorado", has been published by the Colorado Bar Association as a service to the law schools and Bar of Colorado. About two years ago, realizing that some confusion existed as to the status of the Canons of Judicial Ethics and the Canons of Professional Ethics in Colorado, the Grievance Committee recommended to the officers of the Association that a booklet on ethics be published and distributed to members of the association and to senior students in the law schools of Colorado. Senior law students in the legal ethics class at the University of Colorado Law School performed the task of compiling statute and case law in Colorado dealing with the conduct of lawyers and judges, so the booklet represents the combined efforts of many lawyers and law students.

The contents include the oath of admission, the Canons of Professional Ethics, additional court rules relating to professional ethics, rules of the Supreme Court of Colorado for disciplinary proceedings (which will become effective January 13, 1959), the Canons of Judicial Ethics, Colorado constitutional and statutory provisions relating to judges and attorneys, and a digest of Colorado cases.

The Bar Association of the District of Columbia has been asked by the District Court for assistance in providing veteran members of the Bar who will volunteer for the defense of indigents in criminal cases. Recently, this work has fallen heavily upon a small number of volunteers, most of whom are younger members of the Bar. The request was taken up promptly at a special meeting of the Board of Directors.

The Board determined that the needs of this emergency will be served if all lawyers with ten years' experience or more offer their services for a single case. It is hoped that relief of this condition will come through passage of legislation now pending in Congress providing for compensation for assigned counsel appointed to defend indigents in criminal cases. The Association has endorsed and supported this type of legislation and the great need for permanent provision for counsel in these cases gives rise to the hope that the legislation will be successful in this session of Congress.

The formation of the "Inter-American Legal Foundation", which will stress educational, scientific, literary and charitable purposes, has been announced by President Cody Fowler of the Inter-American Bar Association. A non-profit corporation, its broad purpose is to "promote, establish and maintain relations between associations and organizations of lawyers and members of the Bar, both national and local, in the various countries of the Western Hemisphere".

The Foundation will grant scholarships and foster legal research. It will publish and distribute books on subjects of particular interest to the Inter-American legal profession and judiciary. The affairs of the Foundation will be managed by a president, vice president, secretary and treasurer, who will be elected annually by the Board of Directors of the Foundation.

We have received the following letter from Mr. Fowler:

> I recently accepted the Presidency of the Inter-American Bar Association because I was assured by representatives of our Government, and by friends in the United Nations, that therein is an opportunity for constructive service on behalf of my country.
>
> This organization, sponsored by the American Bar Association, has been active for some seventeen years and has done most constructive work in the field of International and Comparative Law and in service to those doing business in the Western Hemisphere.
>
> The bar associations of some twenty Latin American countries and of the United States are members. The association now accepts individual members.
>
> The senior membership fee is only $10.00; the junior membership fee (lawyers practicing under five years), $5.00; and the sustaining membership fee only $25.00. I am a senior member.
>
> This is the one organization in which we can work shoulder to shoulder with members of the bars in other nations of the Western Hemisphere, thus creating friendship and understanding among our neighbor nations and promoting solidarity in the United Nations in these troubled times when we need friends.
>
> The association is taking a strong and aggressive stand in favor of democracy, which includes the fighting of Communism threatening some of these nations. This campaign needs our individual support.
>
> May I invite you, gentlemen of the American Bar Association, to join in this constructive endeavor. Send your check either to me at the Citizens Building, Tampa 2, Florida, or to the office of the Inter-American Bar Association, 1129 Vermont Avenue, Washington, D.C. Your certificate of membership will be mailed in due course after acceptance of your membership.
>
> CODY FOWLER

With the aim of building a bar center in Nashville, the Tennessee Bar Association has sponsored the organization of a Tennessee Bar Foundation. News of the project was announced following the first meeting of the Board of the Foundation on March 8 in Nashville.

Officers of the Foundation elected were Charles G. Morgan, of Memphis, President; John J. Hooker, of Nashville, Vice President; and John C. Sandidge, of Nashville, Secretary-Treasurer.

The proposed building would provide headquarters for the Tennessee Bar Association and office space for other related organizations, such as the Board of Law Examiners, the Code Commission, the Judicial Council and a legal periodical library. The Board of Directors is interested in a site in the Capitol Hill Business Center. Mr. Hooker was authorized to select a committee to investigate the possibility of this location and report at the annual meeting of the bar association which begins June 12 in Memphis.

The Seventh Conference of the International Bar Association will be held in Cologne, Germany, July 21-26, 1958, at the invitation of the Deutscher Anwaltverein (German Bar Association). Assisting in the organization and arrangements for the Conference will be the Kölner Anwaltverein (Cologne Bar Association).

The International Bar Association is a federation of the national bar associations of thirty-five countries, with approximately five hundred individual members of the legal profession from all parts of the world affiliated as Patrons.

The following topics will be discussed at Cologne on the basis of papers prepared by individual members of the various national bar associations:

1. International Problems of Tort Liability and Financial Protection Arising Out of Atomic Operations. (Rapporteur and American Bar Association author—Dean E. Blythe Stason, of the University of Michigan.)

2. The American Close Corporation and Its Equivalent, and the Status of Wholly-Owned Subsidiaries in Other Countries. (Rapporteur—Maître Philippe Gastambide, of France; American Bar Association author—Willard P. Scott, of New York.)

3. Monopolies and Restrictive Trade Practices. (Rapporteur—R. O. Wilberforce, Q.C., United Kingdom; American Bar Association author—Edward F. Howrey, of Washington, D.C.)

4. The Legal Profession:

(a) Insurance Protection Against Any and All Types of Lawsuits—the Propriety and Legality. (Chairman of the Committee—Ilmo. Sr. D. Roberto Reyes Morales, of Spain; American Bar Association member—G. A. Whitehead, Jr., of New York; Consular Law Society member—Theodore R. Kupferman, of New York.)

(b) Qualification To Practice Law in the Foreign and International Field. (Chairman of the Committee—Sr. Manuel G. Escobedo, of Mexico; American Bar Association Committee Member—John J. Goldberg, of San Francisco.)

(c) Consideration of the Various Plans for Providing Retirement In-

come for Members of the Legal Profession. (Chairman of the Committee—Dr. H. M. Voetelink, of The Netherlands; American Bar Association Committee Member—John R. Nicholson, of Chicago.)

5. Administration of Foreign Estates. (Chairman—Dr. Jur. Bernt Hjejle, of Denmark; Vice Chairman—Hoyesterettsadvokat Ole Thorleif Roed, of Norway; American Bar Association Committee Member—Otto C. Sommerich, of New York.)

6. International Shipbuilding Contracts. (Chairman of the Committee—Hoyesterettsadvokat Per Brunsvig, of Norway; American Bar Association Committee Member—Alan B. Aldwell, of San Francisco.)

7. Protection of Investments Abroad in Time of Peace. (Chairman of the Committee—Dr. Kurt Ehlers, of Germany; American Bar Association Committee Member—Lowell Wadmond, of New York.)

8. Legal Aid. (Chairman of the Committee—Sir Sydney Littlewood of the United Kingdom; American Bar Association Committee Member—William H. Avery, Jr., of Chicago.)

9. International Judicial Co-operation—Bases for Agreement Between Civil Law and Common Law Countries. (American Bar Association Chairman of the Committee—Harry LeRoy Jones, of Washington, D.C.; American Bar Association Vice Chairman—Philip W. Amram, of Washington, D.C.)

A resolution will be acted upon by the General Meeting (the controlling body of the I.B.A.) which was drafted in 1956 at the Oslo Conference by a committee of which William Harvey Reeves, of New York, was a member, concerning limitations on sovereign immunity of friendly alien sovereigns for commercial dealings with persons and corporations in other countries.

There will also be a meeting at Cologne of the Advisory Committee on Professional Ethics—appointed by Member Organizations after the adoption at Oslo of the International Code of Ethics for the Legal Profession. Dr. J. R. Voûte, of The Netherlands, is the Chairman.

The Conference will be held in the Gürzenich in Cologne. The Gürzenich, erected in the fifteenth century, is one of the outstanding buildings in Cologne. Since medieval times, visiting royalty and official guests of the city have been received there. Although badly damaged during the Second World War, it has been completely restored and modernized.

It is planned to have simultaneous translations for the Plenary Sessions and other sessions which will be held in the Great Hall of the Gürzenich.

Among the social events will be an excursion to the Petersberg, the famous hilltop restaurant overlooking the Rhine, where the Deutscher Anwaltverein will give a "Kaffeetafel" (coffee and tea party). The tour will then proceed to Königswinter, and from there by steamer back to Cologne. Other social events include a reception by the Federal Minister of Justice, to be held in the Schloss Brühl, a unique example of the high baroque style. The Mayor of Cologne will receive conferees and guests at a reception in the Walraf-Richartz-Museum. The closing banquet will be held at the Gürzenich.

The officers of the I.B.A. are Dr. Emil von Sauer (President of the Deutscher Anwaltverein, Germany), President; Loyd Wright, of Los Angeles (Past President of the American Bar Association), Chairman; Gerald J. McMahon, of New York, Secretary General; Thomas G. Lund (Secretary of The Law Society in England), Treasurer; Rolf Christophersen (Norway) and Heinz Brangsch (Germany), Assistant Secretaries General; Paul B. DeWitt (Executive Secretary of The Association of the Bar of the City of New York), Assistant Treasurer; and one Vice President from each member organization. Conference arrangements in Cologne are under the direction of Dr. Walter Oppenhoff, President, and Dr. Herbert Glaub, Secretary of the Kölner Anwaltverein.

Further information may be obtained from Gerald J. McMahon, Secretary General of the International Bar Association, 501 Fifth Avenue, New York 17, New York.

Activities of Sections

SECTION OF TAXATION

Legislative matters have occupied a major portion of the time and attention of officers and committees of the Section of Taxation during the past several months.

On December 18, 1957, the Chairman of the Section, Lee I. Park, of Washington, D. C.; the Vice Chairman of the Section, William R. Spofford, of Philadelphia; the Chairman of the Section's Co-ordinating Committee, Eugene F. Bogan, of Washington, D. C.; and the Vice Chairman of the Co-ordinating Committee, Frederick A. Ballard, of Washington, D. C., met with several members of the staff of the Joint Congressional Committee on Internal Revenue Taxation for the purpose of presenting and discussing with them a compilation of critiques and suggestions received from members of the Section on fifty-four of the eighty-one sections of H.R. 8381 (the so-called "Technical Amendments Act of 1957"), then pending in the House of Representatives, which would amend the Internal Revenue Code of 1954. These comments were submitted pursuant to a resolution adopted by the House of Delegates at the Annual Meeting last July authorizing the Section to co-operate with the appropriate committees of Congress and members of their staffs with respect to H.R. 8381 in the same manner as the Section co-operated with respect to the 1954 Code. It was made clear to the members of the staff that the critiques represented only the views of individual members of the Section and were not to be taken in any way as recommendations of either the Association or of the Section.

It was pointed out at the meeting of December 18 that the Association had adopted six recommendations closely parallel in purpose and effect to certain provisions included in H.R. 8381. It was also pointed out that long prior to 1954 the Association had recommended adoption of provisions similar to those contained in the Internal Revenue Code of 1954 eliminating the so-called "premium payment test" for the purpose of determining the taxability of proceeds of life insurance in which the decedent possessed no incidents of ownership at the time of his death, and that approximately one third of all the comments received from members of the Section on H.R. 8381 were specifically concerned with, and opposed to, the proposal in Section 56 of H.R. 8381 to restore the "premium payment test".

On January 28, 1958, the House of Representatives passed H.R. 8381 after eliminating Section 56 and making other minor changes, and the hearings on the bill have subsequently been held by the Senate Finance Committee.

During January and February the Ways and Means Committee conducted extensive hearings on "General Tax Revision" and on February 3 Mr. Park appeared before the Committee to recommend enactment of fifty-four recommendations of the Section approved by the House of Delegates for amendment of the Internal Revenue Code of 1954. A bill (H.R. 9035) containing a provision similar in purpose to one of the fifty-four recommendations had passed the Congress at the time of Mr. Park's appearance before the Committee and has since been signed by the President. Mr. Park devoted a considerable part of his testimony to four of the remaining fifty-three recommendations which appeared to involve departures from, or modifications of, previous policy patterns. One of the four would allow a deduction for income tax purposes of a very limited category of expenses incurred in advocating or opposing legislation. Another would provide for a deduction of expenses incurred in connection with estate planning, such as expenses incurred for the preparation of a will or an irrevocable trust. The third would limit the exemption from tax of unrelated business income of a church to income attributable to use of the church's own funds, and exclude from the exemption unrelated business income attributable to use of borrowed funds (other than necessary current operating obligations). The fourth would provide for a statute of limitations of eight years, where there is now none, in cases of civil fraud with respect to federal taxes. Particular attention was also given to the Association's proposal to include mechanic's lienors in the list of those persons (mortgagee, pledgee, purchaser and judgment creditor) now given priority over federal tax liens in instances where the private lien arises before notice of the federal lien has been filed as required by statute. Questions by members of the Committee indicated considerable interest in the recommendations.

In addition to the fifty-four recommendations for amendment of the Internal Revenue Code of 1954, the House of Delegates has approved two other recommendations of the Section, one dealing with the Social Security System and one with a change in the Judicial Code with respect to venue for suits by corporations for refunds of taxes. The latter recommendation was introduced in bill form by Chairman Celler of the House Judiciary Committee as H.R. 9817 and on March 20, 1958, Judge Albert B. Maris of the U.S. Court of Appeals for the Third Circuit appeared before a subcommittee of the House Judiciary Committee in support of the bill on behalf of the Judicial Conference of the United States.

All of the fifty-six recommendations referred to were compiled for purposes of Mr. Park's testimony in a booklet containing the text of each recommendation and a general explanatory statement with respect thereto, and until the supply is exhausted, a copy of the compilation can be obtained by writing to Headquarters of the Section of Taxation, 1025 Connecticut Avenue, N.W., Washington 6, D. C. His testimony, including his formal statement and discussion with members of the Committee at the hearing, and the contents of the booklet, will also be reproduced in the official record of

the hearings, copies of which should be available at the Government Printing Office.

SECTION OF JUDICIAL ADMINISTRATION

The state committees of the Section were called upon to take the initiative in the observance of Law Day—U.S.A. within their respective jurisdictions. All state committee members were sent copies of the American Bar Association's helpful handbook of information and suggestions on obtaining state and local proclamations and the formulation of plans for the celebration.

Section Chairman Tom C. Clark has appointed a committee to study and report on a Model Judicial Act under which the states could set up efficient and effective court structures to eliminate duplications and delays in both trial and appellate courts, including courts of limited jurisdiction such as traffic courts, justices of the peace, police courts and domestic relations courts. The committee is made up of Judge Thomas Powers, of Akron, Ohio, Justice Walter V. Schaefer, of Chicago, and John M. Lynham, of Washington, D. C., with Judge Ivan Lee Holt, Jr., of St. Louis, as Chairman.

Plans are going ahead for the Section's participation in the Midwest Regional Meeting in St. Louis on June 11-13. Chief Judge Bolitha J. Laws will preside over his "Law and the Layman" program in the Jefferson Hotel, and there will also be a panel discussion on Uniform Rules of Evidence of particular interest to trial court judges and practitioners.

The legislation now before the Congress to authorize the Judicial Conference to conduct a continuous study of the Federal Rules has not only been endorsed by the American Bar Association but also by the Federal Bar Association and the Seventh Federal Circuit Bar Association, in addition to several state bar associations. Indications are that favorable action on the legislation will be taken in the near future.

The Section's membership drive is beginning to show results. Starting with a little over 500 members last August, the number has grown to approximately 1,200. This expansion is important to the work of the Section because it gives broader support to the programs designed to improve the administration of justice and thereby increases their effectiveness.

Extensive plans are being made for the Section's participation in the annual meeting at Los Angeles next August. The "Law and the Layman" program will again be presented and there will be programs on uniform rules of evidence, uniform jury instructions in civil cases, tasks of the trial judge, and a traffic court program to be jointly sponsored by the Section and the Association's Special Traffic Court Committee headed by James Economos. At the dinner traditionally given by the Section for the judiciary, Attorney General William P. Rogers will be the main speaker.

The Section lost one of its dearest friends and staunchest supporters with the death of Chief Judge John J. Parker in March. A booklet pointing out the great achievements of Judge Parker, who established the Section's State Committee some twenty years ago, is now being prepared as a memorial to him.

SECTION OF PUBLIC UTILITY LAW

The Council of the Public Utility Law Section of the American Bar Association held its midyear meeting at Boca Raton, Florida. Attendance included most of the Council members and a number of past Chairmen.

Formal meetings were held on most topics and various informal committee meetings also took place. Prime attention was devoted to the crystallization of the program for the annual meeting at Los Angeles. Topics of current interest involving all types of utilities and transport companies, as well as atomic energy, were decided upon and a list of interesting speakers was selected.

Attention was also given to the work of the Standing Committee, which prepares annually a digest summary of all developments in the field of public utility law. An effort is being made to distribute this volume to members of the Section prior to the Los Angeles meeting.

An appropriate resolution was adopted on the death of the Section's former Chairman, E. Justin Moore, of Richmond, Virginia.

Time was devoted to the several phases of the Section's relationship to other Sections and special committees in order both to eliminate overlapping of effort and to be certain that subjects of special importance to the Section were adequately followed. In the latter category, the Council has found that the Commission on Uniform State Legislation has subcommittees preparing state legislation relating to utility law. It was decided that closer liaison with these efforts is desirable. In view of the importance, a new committee to follow this development was created, headed by Ralph M. Besse, a former Chairman of the Section.

The Council also decided that the specialized character of its field of interest did not warrant participation in Regional Meetings.

SECTION OF CORPORATION, BANKING AND BUSINESS LAW

The Model Business Corporation Act, sponsored by the Section, has been substantially adopted in one more state. On March 6 the Governor of Colorado approved the Colorado Corporation Act to become effective January 1, 1959. A devoted and hard-working committee of the Colorado Bar Association produced the draft for this Act, based on and substantially like the Model Act. As this goes to press, we are advised that the Uniform Commercial Code, also sponsored by the Section, has been adopted in Kentucky and was signed there by Governor Chandler on March 28.

The Section is looking forward to the Midwest Regional Meeting to be held in St. Louis and will hold programs during most of the day, Friday, June 13. From 10:00 until 12:00 that morning, a panel discussion will be presented on "Dangers under Recent Federal Tax Lien Decisions—The Urgent Need for Federal Legislation To Protect the Property of Third Parties (such as mortgagees, sureties, materialmen, contractors, legal coun-

sel, warehousemen, etc.)." The moderator will be John J. Creedon, of New York. The panelists will include: William T. Plumb, Jr., of Washington, D. C., Chairman of the Committee on Federal Tax Liens and Collection Proceedings of the Section of Taxation; Earl Q. Kullman, of New York, Chairman of the Committee on Relative Priority of Government and Private Liens of the Section of Real Property, Probate and Trust Law; and three members of the Section of Corporation, Banking and Business Law, David A. Bridewell, of Chicago, Chairman of the Committee on Savings and Loan Law; Sydney Krause, of New York, Chairman of the Committee on Bankruptcy; and Harold F. Birnbaum, of Los Angeles, Chairman of the Subcommittee on the Relative Priority of Liens. Four of the panel members have been appointed by President Charles S. Rhyne to the Association's Committee on Federal Liens which is charged with preparing appropriate legislation in this area for submission to the House of Delegates at the Annual Meeting in Los Angeles next August.

A luncheon will be held in St. Louis at noon, Friday, June 13, under the joint sponsorship of the Section's Committee on Savings and Loan Law and the Attorneys' Committee of the United States Savings and Loan League. This will be followed in the afternoon by a series of talks and discussions of particular interest to counsel for savings and loan associations. A similar luncheon and program held at the Southern Regional Meeting in Atlanta, February 22, overflowed the accommodations, and larger quarters are being planned for St. Louis.

You will want to note on your calendar the dates for the Section's participation in the Annual Meeting of the American Bar Association in Los Angeles. The over-all dates for the meeting are August 25-29. Sessions and programs of the Section will be held on Monday afternoon, August 25, and Tuesday afternoon, August 26, with a general Section luncheon, addressed by an outstanding speaker, at noon on August 26. Details will be given in a later issue.

Department of Legislation

(Continued from page 462)

of the faculty from the several participating institutions have also met with the seminar, and administrative department heads have contributed their time to discuss various substantive problems facing the state.

Midway in the first year of an experimental program, it is unquestionably too early to attempt a full appraisal of its value as an educational tool in the training of lawyers, teachers and journalists and, correspondingly, as an aid to the Legislature. Several observations may be made, however, which provide cause for optimism that the original aims of the program's proponents will be realized.

It is clear, for example, that the interns proved capable, almost from their first day of service, of participating meaningfully in the work of their committees and contributing to their effectiveness. A review of this work indicates that it has covered a wide range of projects, including routine assignments to be sure, but involving for each intern challenging and demanding tasks which have, in fact, capitalized upon their previous training and which have, in turn, contributed to the intern's knowledge and experience. Important, too, has been the ability of the group to obtain acceptance and win respect among the permanent professional staff of the Assembly, a not insignificant fact in the close-knit environment of a state capitol. The apparent effectiveness of the on-the-job experience is also revealed by the growing understanding of the legislative process evidenced in the seminar sessions. As the year has advanced, discussion has become more sophisticated and perceptive as the interns have attempted to resolve seemingly conflicting questions of theory and practice.

For the one lawyer-intern, specifically, the program has proved to date to be an undoubted success, although here, too, it is premature to attempt any long-range appraisal. The assignment of this intern to the Assembly Judiciary Committee, concerned as it is with the broad content of civil and criminal law, was appropriate in view of the committee's concern with legal research, bill drafting, law revision and codification. However, the unique value of the program, for the lawyer as for all of the interns, derives not from this emphasis upon the technical aspects of the law, but from the opportunity to gain an understanding of the total social, political and legal reality which is the legislative process. This understanding is, of course, as important to the lawyer as to the teacher of politics or the newspaper columnist, and in this respect, almost all of the committees or legislative offices to which interns may be assigned provide an excellent vantage point. The increasing contact of the lawyer with governmental administrative agencies in behalf of private clients, the growing awareness of the legitimacy and importance of legislative advocacy, and of the usefulness of the lawyer in this role, the continuing tendency of the legal profession to produce far more than its proportionate share of legislative and political leaders, to note but a few of the more obvious relationships, suggest the appropriateness of such an experiment as the California Legislative Intern Program for new lawyers.

For 1958-59, the program will probably continue much as at present, with certain changes in emphasis resulting from the fact that the 1959 Legislature will meet in general session for 120 days, in contrast to the thirty-day budget session in 1958. For 1958-59, too, a small but perhaps significant change is planned in recruitment. Whereas the first year of the program was restricted to graduate students from one of the five directly participating institutions, applications are being invited for 1958-59 from students enrolled at any of the accredited law schools in the state or from accredited colleges offering graduate instruction. However, successful applicants must be eligible for admission to and plan to register in one of the five sponsoring schools during the internship period. For further information, interested students are requested to contact their department chairmen or deans, all of whom have been sent descriptions of the program and instructions for prospective applicants.

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe, Washington, D. C., Editor-in-Charge

BANKRUPTCY: In March of 1957, Herbert U. Feibelman, of the Miami Bar, delivered a lecture at the Alabama Law School on the importance of Alabama law in bankruptcy as to fraudulent transfers, exemptions, discharges, liens and other matters. Mr. Feibelman practices in Miami, Florida, where he is Chairman of the State Bar's Bankruptcy Committee, but he happens to be a native of Alabama. His lecture can be of value to all of us in blocking out points where the bankruptcy act incorporates state law. This is important, as generally bankruptcy law follows *Swift* v. *Tyson* rather than *Erie* v. *Tompkins*. *The Alabama Lawyer* for October, 1957, publishes Mr. Feibelman's lecture under the title "How Does Alabama Law Affect Administration in Bankruptcy?", pages 367-368. For a copy send a dollar to Judge Walter B. Jones at P.O. Box 708, Montgomery 1, Alabama.

SUPREME COURT OF THE UNITED STATES: As you would expect there has been a rash of articles with respect to the work of the Supreme Court at its 1956 term.

One of the best is by Professor Daniel M. Berman, a political scientist with the University of the State of New York at Fredonia, New York (7 *Cath. U. Law Review*, pages 1-15; address: Columbus School of Law of The Catholic University of America, 1323 18th Street, N.W., Washington 6, D.C.; price: $2.00). It is entitled: "Mr. Justice Brennan: A Preliminary Appraisal" and is extremely valuable in that it compares the Justice's New Jersey decisions with his Supreme Court rulings. In addition the testimony that Justice Brennan gave before the Judiciary Committee of the Senate when he was confirmed is discussed in considerable detail.

Another excellent piece is by Professor Doris M. Yendes of the University of Nebraska College of Law at Lincoln, Nebraska. It is entitled "A Proposed Plan for Commissioners for the United States Supreme Court" and appears in 25 *Kansas City Law Review*, pages 178-199. (Write Kansas City Law School, Kansas City 10, Missouri, and send $1.25.)

There is only one thing wrong with Miss Yendes' fine article. It should have been dedicated to Mr. Justice Whittaker who is a graduate of Kansas City Law School.

When he was a professor, with the aid of Landis and Hart, Mr. Justice Frankfurter used to write articles of this type in the *Harvard Law Review*. Bennett Boskey wrote one in Columbia in 1946 (Vol. 46, page 255) and more recently starting with the 1949 term, Professor Fowler Harper of Yale Law School with his students wrote a series as to "What the Supreme Court Did Not Do" in the *University of Pennsylvania Law Review*. Unfortunately Professor Harper has not written since the 1952 term. This makes Miss Yendes' piece most valuable. It reveals these statistics:

Term	Cases Filed	Certiorari Petitions	Percentage Granted
1953	1453	1217	13 %
1954	1557	1263	16.9%
1955	1849	1491	16.1%

Comparable figures for the October, 1956, term ending June, 1957, are even higher as some 2,021 cases were filed of which 1616 were petitions for certiorari. Approximately 17.3 per cent of petitions not in forma pauperis were granted in 1956-1957. As Professor Harper before her, Miss Yendes concludes that the work the Supreme Court does not do is "as important as the work which it does". She urges with great persuasion that the Court should use Commissioners in the manner of the Supreme Court of Missouri. It might be added that Chief Judge Quinn recently testified before the House Armed Services Committee upon the invaluable assistance that Commissioners give the Court of Military Appeals. This article will be of great value to the Committees of our Association who study Supreme Court review. In this connection attention should be called to the September, 1957, Report of the Judicial Conference of the United States which proposes Congress by statute authorize it to propose court rules. To date apparently the Supreme Court has been unable to act on the amendments to the Federal Rules of Civil Procedure proposed in October, 1955, by George Wharton Pepper's Committee of which Judge Charles E. Clark was Reporter. Other members were Leland L. Tolman, Secretary, and Armistead M. Dobie, Robert G. Dodge, Sam M. Driver, Clifton Hildebrand, Monte M. Lemann, Edmund M. Morgan, Maynard E. Pirsig and John C. Pryor. Professor James William Moore was also a committee member but dissented from the proposed changes. Mr. Tolman explained the amendments in this JOURNAL (40 A.B.A.J. 843) and the writer (41 A.B.A.J. 42) reviewed two excellent articles—one by Judge Charles Clark in 14 *Ohio State Law Journal* 241 and the other by Professor Charles Alan Wright in 7 *Vanderbilt Law Review* 521, which explained the amendments in some detail. Along with Miss Yendes' piece and this new Judicial Conference Report, attention should be called to "The Rule of Four" by Miss Joan Maisel Leiman in the November, 1957, *Columbia Law Review* (Vol. 57, pages 975-999; price $1.50; address Kent Hall, New York 27, New York) Miss Leiman discusses the recent cases under the Jones Act and Federal Employers' Liability Act in which Mr. Justice Frankfurter re-

fused to deal with the merits even though four Justices had voted to grant certiorari.

In the fall, 1957, issue, *Georgetown Law Journal* (Vol. 46, pages 1-20; price: $1.25; address: 506 E Street, N.W., Washington 7, D.C.) my Cornell classmate Senator Tom C. Hennings, Jr., of Missouri, has a piece on the Supreme Court entitled "Equal Justice Under Law". It has always been my view that more lawyers should write for the law reviews but reading Henning's piece makes me doubt that the rule applies to Senators. Political opponents love to get the other fellow in print, and if I understand what the Senator has written he would favor the third degree by the police in Alabama but deplore it in Washington, D.C. There are those who want the third degree given to everyone in Washington. Despite this reservation, the Senator's piece is interesting indeed.

Annually Professor McCloskey of the Harvard Government Department reports on the Supreme Court in the *Virginia Law Review*. His report on the October, 1956, term is as usual very well done (Vol. 43, pages 803-835). It is entitled "Useful Toil or the Paths of Glory? Civil Liberties in the 1956 Term of the Supreme Court". Like Berman's piece, this one has the lucidity of the political scientist, and lawyers who want to rest while they read will love it. Wisely, I think Professor McCloskey sticks to his last and does not attempt legal analysis. (Price: $2.00; address: Charlottesville, Virginia.)

Perhaps many readers saw the interesting article Professor Bernard Schwartz of New York University Law School wrote with respect to the Supreme Court in the *New York Times Magazine* on August 25, 1957. Those who missed it can catch the substance of his views in the November, 1957, issue of his school's law review (Vol. 32, pages 1202-1241; price: $2.00; address: Vanderbilt Hall, Washington Square South, New York 3, New York.)

Late, but better than never, the delightful speech that Dean Acheson delivered at the annual dinner of the American Law Institute at the Mayflower Hotel in Washington, D.C., on May 25, 1956, has at last been printed in *The Alabama Lawyer* for October, 1957 (Vol. 18, pages 355-366; price: $1.00; address: P.O. Box 708, Montgomery, 1, Alabama). It is entitled: "Recollections of Service with the Federal Supreme Court" and in it Mr. Acheson recalls his personal experiences as a law clerk to Mr. Justice Brandeis. Particularly fine in print as at the Mayflower is Mr. Acheson's discussion of Mr. Justice McReynolds, the "Ogre of the Liberals". Mr. Acheson tells us nothing could be more wrong than to think McReynolds was "a terrible person" just because he was "part ogre". Everything about Justice McReynolds was a matter of "passionate prejudice" be it "women lawyers", "tobacco smoke" or "Justice Brandeis".

In the *Harvard Law Review* for November, 1957 (Vol. 71, pages 85-200; price: $1.35; address: Gannett House, Cambridge, Mass.), the editors present a detailed analysis of each of the cases decided by the Supreme Court during its October, 1956, term. To this review, Professor Arthur E. Sutherland, Jr., writes a "Foreword" entitled "The Citizen's Immunities and Public Opinion". It is beautifully written with that dispassionate quality that enables Art Sutherland to look with equanimity on both sides of a controversy.

Sutherland's ability to write so well and to view matters so fairly, I envy. It is not my cup of tea, alas! If you want to be convinced, read "Comments on the Supreme Court's Treatment of the Bill of Rights in the October, 1956, Term" (26 *Fordham Law Review* 468-505; price: $1.00; address: 302 Broadway, New York 7, New York) and "Jinks and Jencks: A Study of Jencks v. United States in Depth" in 7 *Catholic University Law Review*, number 2; (address: Columbus School of Law of Catholic University of America, 1323 18th Street, N.W. Washington 6, D.C. and send $2.00). The name of this piece was inspired by "Captain Jinks of the Horse Marines" who fed his horse on corn and beans though as a mere captain it was quite beyond his means. (*History of Popular Music in America*, by Sigmund Spaeth, Random House, New York, N.Y., 1948, pages 167-168). William Horace Lingard wrote the words to "Captain Jinks" and T. MacLagen the music in 1868.

One can wonder what music and singing and dancing have to do with the Supreme Court of the United States. Members of The Association of the Bar of the City of New York wondered the same thing when they made the good mistake to select Harry Tweed as President. The horrible Tweed Administration converted what was a mausoleum into a place of merriment. Captain Jinks is no Tweed, but they have a fellow at Harvard Law School named Professor Richard H. Field who bids fair to do to the Supreme Court what Tweed did to The Association of the Bar.

During the course of his concurring opinion in *Fikes* v. *Alabama*, 352 U.S. 191, Mr. Justice Frankfurter commented that the facts of the case in combination "bring the result below the Plimsoll line of 'due process'." As if "due process" were not uncertain enough, the poor practicing lawyer that applies it must find its Plimsoll line. And by hard research, Professor Field found "a ship has two Plimsoll marks, one for summer and the other for winter. And a ship sailing on both salt and fresh water has a pair for each." Actually a ship has many more. Field ended by writing a poem to which no doubt he will add music and a dance.

In part the Field poem runs:

Due process, once a slippery slope,
Is now a Plimsoll line,
Of rigid and invariant scope
And easy to define.

* * *

Sam Plimsoll was the seaman's friend,
A liberal M.P.:
"The day of 'coffinships' must end",
He swore repeatedly.

* * *

Sam Plimsoll was so eloquent
That Parliament gave heed,
And sought this evil to prevent,
With all deliberate speed.

* * *

So if for metaphor you yearn,
You'd better find a new one
To help your readers to discern
The process that is due one.

* * *

Words are the skin of living thought
But here's an overstuffed one.

This time the mark you overshot;
Indeed, you've simply muffed one.

This fall from grace we should not mock;
The truth has always been
That he who aims at twelve o'clock
Will sometimes strike thirteen.

But Burbank is not brought to book
For one imperfect calyx;
So we're prepared to overlook
One metaphor infelix.

For all the verses in this lovely poem, consult the November, 1957, *Harvard Law Review* (Vol. 71, pages 77-81; price: $1.50; address: Gannett House, Cambridge, Mass.) Nothing so fine has been writen since *Of Thee I Sing* and *Let 'Em Eat Cake.*

WAR BETWEEN THE STATES: There is in Mobile, Alabama, a grand young lawyer approaching his 102d birthday, named S. Palmer Gaillard, Sr. When he was a brash youth of 98, on November 29, 1954, he brought Professor Arnold J. Toynbee to book for saying:

The American Negro convert to Christianity does not, of course, really owe his conversion to the ministrations of a plantation-gang overseer with a Bible in one hand and whip in the other. He owes it to the John G. Fees and the Peter Clavers.

While praising Toynbee for his book, Lawyer Gaillard indicts him for the above statement on three counts.

First, Mr. Gaillard points out that Yankees from New England brought the slaves from Africa, trading rum for them. In 1638 the first cargo came to Marblehead, Massachusetts, in a ship named *The Desire.* Eight to 10 per cent of the slaves died on shipboard. In 1750 Massachusetts used 15,000 hogshead of rum and from 1755 to 1766 landed over 23,000 Negro slaves.

Second, Mr. Gaillard declares that at all times before and after the war he received from his families' servants "the same warmth and affection" he received from his parents. Their loyalty is attested by their remaining faithful to the defenseless women and children left behind during the war.

Third, while confessing to the moral evil of slavery and the mistake of the South in paying good hard cash for slaves that Yankees bought for rum, Mr. Gaillard contends that many a Southern Negro learned his religion from his Southern masters, not all of whom were cruel overseers with Bibles in one hand and whips in the other. For proof Mr. Gaillard invites Toynbee to come to Mobile and visit the "Big Zion African Methodist Church" that was dedicated on September 17, 1842, by Negroes who previously worshipped with their slave owners in their church.

There is no indication that Professor Toynbee answered Mr. Gaillard but if interested you can read the entire letter in *The Alabama Lawyer* for October, 1957, where it is published under the title "Errors of Historian Toynbee" at pages 349-354. You get this fine paper by sending a dollar to its editor Judge Walter B. Jones at P.O. Box 708, Montgomery 1, Alabama. My great thanks to Herbert U. Feibelman, of the Miami Bar, for telling me about this remarkable lawyer who at 102 has a law review piece published. Hats off to him!

The Search for Administrative Justice

(Continued from page 453)

The common lawyer has been accustomed to think of the separation of powers as one of the leading characteristics of his constitutional system. "It is believed to be one of the chief merits of the American system of constitutional law", the United States Supreme Court has asserted, "that all the powers entrusted to government, whether state or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined."[30]

In the Anglo-American system the doctrine of the separation of powers has become in effect a doctrine of the *specialization* of powers. Each branch of government is to exercise the type of power conferred upon it—legislative, executive or judicial—free of interference from the other branches. As for the courts, the delegation to them of the judicial power has meant that to them is confided the resolution of all justiciable controversies; and this control has meant that they are competent to decide cases involving the exercise of authority by the executive branch. Thus, in the common-law world, the courts have come to control the legality of administrative action. As pointed out by British jurists, an administrative "tribunal is not an autocrat free to act as it pleases, but is an inferior tribunal subject to the jurisdiction which the Court of King's Bench for centuries, and the High Court since the Judicature Acts, has exercised over such tribunals".[31] Nor, in the Anglo-American view, does this judicial control compromise the inde-

30. *Kilbourn* v. *Thompson*, 103 U. S. 168, 190 (1880). See Vanderbilt, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE (1953).
31. *Rex* v. *Board of Education*, [1910] 2 K.B. 165, 178.

pendence of the executive branch required by the separation-of-powers doctrine. The judicial function is seen as solely to determine the law applicable to controversies. The simple fact that the administration happens to be one of the parties in a particular case does not mean that a court, in deciding that case, is exercising other than purely judicial power.

Separation of Powers . . . Constitutional Cornerstone

In France, as in the common-law world, the separation of powers forms a cornerstone of constitutionalism.[32] The doctrine there has, however, received an interpretation wholly unlike that to which the common lawyer is accustomed. Anglo-American constitutional history is a record of attempts by legislature and courts to restrain excesses by the executive branch. French constitutional theory, on the other hand, has been influenced by the memory of constant obstruction of the executive branch by the *Parlements*—the common-law courts of appeal under the *ancien régime*. Rightly or wrongly, it was felt that they had unduly opposed efforts toward necessary administrative reforms in order to conserve their own privileges and prerogatives. "It is . . . the memory of these struggles [*i.e.*, between the *Parlements* and the executive] and the detrimental effect on the country's administration which explains the deep distrust with which subsequent French Constitution-makers viewed all judicial activities, and which resulted at the time of the First Revolution in a complete separation not only of the judicial and administrative functions, but also of the judicial and administrative jurisdictions."[33] In the Anglo-American world the struggle of the common law courts with the executive led to the supremacy of the courts over the executive. In France a like conflict has led to the opposite result.

Although objectors to the trend of adjudications by administrative forums, in lieu of judicial forums, who visualize administrative quasijudicial forums, or the establishment of administrative courts as a usurpation of the executive power, the realistic effect of such tribunals is to protect the executive power from over-zealous judicial review under rigid common law standards unsympathetic with practical administrative policy and required evidentiary latitude. More often, however, there appears to have been an executive usurpation of judicial powers. This is because of necessity Congress has not infrequently supplemented the executive power of an administrative agency with legislative or rule-making power and quasijudicial power[34] (*e.g.*, the Interstate Commerce Commission, the National Labor Relations Board, the Social Security Administration of the Department of Health, Education and Welfare, the Civil Aeronautics Board, the Federal Trade Commission, the Civil Service Commission, the Federal Communications Commission, etc.).

Unfortunately Anglo-American administrative law has been unduly influenced by the common law's concern with forms of action. The result has been a tendency to lose sight of the need for simplicity of procedure in administrative-law cases. In this respect the *droit administratif*, with its simple petition to annul an illegal administrative act (*recours pour exces de pouvoir*), certainly appears to be in advance of Anglo-American law. And one can without hesitancy urge that our law follow the French system in this respect by the abolition of the extraordinary remedies and the other forms of review action from the field of administrative law and the substitution for them of a uniform nontechnical petition for review in all cases in which a decision by a court is sought on the legality of challenged administrative action.

The French system of administrative law has been able largely to solve a problem still most acute in the common law world; namely, the expense of litigation. In the common law world the high cost of justice has meant in most cases the practical preclusion of judicial review for those who do not have the necessary financial resources. "The rule we announce . . . makes a tyrant out of every contracting officer", asserted Mr. Justice Douglas in dissent in a recent case[35] in which the Court held that all review was precluded in a government-contract case. But it is not generally realized that the high cost of litigation makes an equally unreviewable tyrant out of every Anglo-American administrative officer, except where the financial impact of administrative action makes it worth while to incur the expense involved in seeking judicial review.

The *droit administratif* has been able to resolve the problem of the expense of justice by its use of the inquisitorial method.[36] Private parties in France can avoid the cost of counsel because of the active role played by the reviewing court itself in developing both sides of the case. It is not, however, suggested that the common law world adopt the French solution, which works as a practical matter only because the review procedure in the *droit administratif* is inquisitorial rather than adversary. What is needed in the Anglo-American system is an attempt to attain the end already achieved by the French system, inexpensive judicial review of administrative action, while avoiding the inquisitorial procedure on which the French solution is based. This end could be attained by the establishment of an office of Public Prosecutor in administrative law

32. Sieghart, GOVERNMENT BY DECREE 157 (1950).
33. *Id.* at 153.
34. 30 HARV. L. REV. 430 (1917).
35. *United States* v. *Wunderlich*, 342 U. S. 98, 101 (1951).
36. Schwartz, FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD, page 127 (1954).

cases.[37] That office would perform part of the role undertaken in the French system by the reviewing court itself; namely, active development of the plaintiff's case against the administration.

Under the inquisitorial procedure followed by the administrative courts in France much of the adversary nature of the review proceeding is eliminated. In this respect the *droit administratif* differs radically from the system in the common law world. With us justice in the courts, in both public and private law cases, is almost completely dominated by what has been termed the "sporting theory of justice".[38] The common law theory of litigation, as Dean Pound has expressed it, "is that of a fair fist fight, according to the canons of the manly art, with a court to see fair play and prevent interference. . . . We strive in every way to restrain the trial judge and to insure the individual litigants a fair fight, unhampered by mere considerations of justice."[39]

The procedure in the French administrative courts appears to go to the other extreme of almost entirely excluding the adversary element. There are few Anglo-Americans who would go so far as to urge following the French system in this respect. But more and more we are coming to realize that the fighting method of conducting trials is carried to excess in our system. "It has contributed to lower the system of administration of justice . . . to the level of a mere game of skill or chance. . . . The right to use a rule of procedure or evidence precisely as one plays a trump card, or draws to three aces, or holds back a good horse till the home stretch, is a distinctive result of the common-law attitude toward parties in litigation."[40]

Many Anglo-Americans would like to have our courts play a more active role in cases in order to eliminate the grosser aspects of our fighting theory of justice. "A court striving to do justice", a federal judge has asserted, "should not put on blinders and ignore matters which counsel overlook."[41] It has been urged, too, that the state assume in our system more responsibility for seeing that relevant evidence is presented. Both of these steps are in the direction of the procedure followed by the administrative courts in France. In this respect, of particular significance is what is known in French law as *expertise*. Under it experts are chosen by the court whose sole concern is to arrive at an impartial evaluation of the facts.[42] The abuse of the expert witness, so prevalent in our system, is thus completely avoided. Few if any common lawyers, to be sure, would go so far as to advocate the importation into our courts of the inquisitorial procedure followed by the Council of State. But the fact that "trial by battle" can be almost entirely eliminated from the workings of the French tribunal should furnish strong practical support for those who urge its minimization in our own judicial system.

Anglo-American courts have consistently refused to inquire into the motives that induced a challenged administrative act. In the *droit administratif*, on the other hand, the reviewing court does exercise an authority to examine into the motivation behind an administrative act.[43] If the French administration has used its authority for a purpose other than that for which the legislature intended it to be employed, its action will be annulled for abuse of power.

Even if one recognizes the limitations on judicial inquiry into cases of this type, it appears that the concept of abuse of power is a valuable adjunct to the authority of the French reviewing court. Under it the judge may go behind the form of a challenged act to determine whether respect for legality did in fact inspire its author. The existence of a similar ground of review would be most useful in our own administrative law, for it would help eliminate American jurists' fears in connection with grants of apparently unrestricted discretionary authority to the administration.

Ultimately important, however, the dispensation of equal and substantial justice in a free democracy requires that the ever-growing labyrinth of economic and social rights must be resolved within the scope of an unobstructed and unobscured separation of legislative, executive and judicial powers as constitutionally intended, devoid of the possibility of arbitrary promiscuity by any branch of the Government. Recognizing this the United Kingdom has established machinery for hearing appeals concerning social insurance claims designed to be entirely independent of the Ministry of National Insurance. Thus impartiality is assured and it would appear that common law cognizance is giving way gradually to a form of continental *droit administratif*.[44]

37. *Id.* pages 127-128; see also Brownell, LEGAL AID IN THE UNITED STATES 97 and 146 (1951).
38. See *In re Barnett*, 124 F. 2d 1005, 1010 (2d Cir. 1942).
39. Pound, *Do We Need a Philosophy of Law?* 5 COL. L. REV. 339, 347 (1905).
40. Wigmore, quoted in *In re Barnett*, 124 F. 2d 1005, 1011 (2d Cir. 1942).
41. *Ibid.*
42. Hamson, *Rule of Law in France: II. Form and Function of the Conseil d'Etat*, THE TIMES (London), February 21, 1951, page 5.
43. Jeze, *La Jurisprudence du Conseil d'Etat et le detournement de pouvoir*, REVUE DU DROIT PUBLIC 58, 59 (1944) (italics omitted).
44. SOCIAL SERVICES IN BRITAIN, British Information Services, Reference Division I. D. 780, Revised, March, 1953, page 14.

There are, however, those who insist that the great need under modern conditions is to increase the efficiency of administration. Any checks on it, they say, must be largely internal, for to allow an alien branch of government to interfere would unduly hamper administrative efficiency. The great safeguard, in their view, lies in the development of interior checks, similar to those that exist within the judicial process—the formation of professional standards and settled ideals of quasi-judicial conduct, the development of adequate procedural rules, professional criticism, internal review, and the like. Above all, great stress is laid on the acquisition by the administrator of the "judicial mind". "If that can once be grasped", asserted a British administrator before a royal commission, "none of the rest matters."[45]

Such a statement ignores basic differences between the administration and the courts. The administrative process is by its very nature deficient in characteristics vital to acquisition of the "judicial mind". The administrator necessarily lacks the independence that is the judge's most prized possession. "Administrative tribunals do not have that independence from government which is one of the traditionally prized guaranties of the justice administered by our common-law courts. Their adjudications taking place as very part and parcel of the process of government, are exposed to the influence of all the political forces which act upon government."[46] The administrator cannot decide disputes with the virgin mind of the judge. The very purpose of administration is to get things done. An administrative agency is created to accomplish certain ends, and it would be derelict in its duty if it were not predisposed in favor of those objectives for which it was created.

These defects are inherent in administration. Attempts to ameliorate them through internal checks alone lose sight of the fact that administration, not justice, is the prime purpose of the administrative process. It is only by recourse to an independent judiciary that the citizen can be adequately protected against administrative illegality. "The principle of checks and balances is a healthy one. An official who is accountable will act more prudently. A citizen who has an appeal to a body independent of the controversy has protection against passion, obstinacy, irrational conduct, and incompetency of an official."[47]

Recent years have seen a marked increase in the number of social and economic controversies which have been removed from the courts to administrative agencies for adjudication.[48] For example, the Social Security Administration must annually dispose of claims before it for adjudication more than ten times greater in number than all the criminal and civil (other than bankruptcy) cases that are determined in the Federal District Courts. If Congress had chosen to require such claimants against the United States to proceed by a conventional form of court action, the district judges with general jurisdiction would soon have been preoccupied by tasks that might better be assigned to special forums having judicial or quasijudicial powers.[49]

In order to cope with such controversies which not infrequently involve the granting of awards and imposition of penalties, a sound system of administrative law must recognize that the position of administration is a subordinate one in the hierarchy of law-makers. The authority to make the law must be vested in the elected representatives of the people. Whatever legislative power the administration possesses must be derived directly from the legislature and exercisable validly only within the limits prescribed. The notion of inherent or autonomous law-making powers in the administration is one that must be rejected. Such rejection alone is, however, of little practical value if those who are aggrieved by administrative action do not have recourse to an independent hearing officer or judge who can determine whether the administration has in fact remained within the bounds fixed by the law. Furthermore, the principle of legality is devoid of effective content unless it is enforced by judicial review. "With all its defects, delays and inconveniences," as Mr. Justice Jackson recently put it, "men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."[50] The legislation recommended by the American Bar Association which appears to represent the predominant view of the legal profession and public at large[51] takes cognizance of this principle by improving the stature and independence of administrative adjudicative proceedings and those who preside over them. While administrative agencies have broad powers to set aside the decisions of hearing examiners, the impartiality and integrity of the quasi-judicial process are inhibitive of improper influence and inflexible policy inequities. If Congress acts favorably upon the proposal, a proper balance of power among the branches of Government and the adequate exercise of impartial due process would seem assured.[52]

45. See Schwartz, FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD, page 336 (1954).
46. *Ibid.*
47. Douglas, J., dissenting in *United States v. Wunderlich*, 342 U. S. 98, 102 (1951).
48. 2 NEW YORK LAW FORUM 169.
49. Gellhorn and Byse, ADMINISTRATIVE LAW, CASES AND COMMENT (The Foundation Press, 1954), pages 6-7; see also W. Gellhorn, FEDERAL ADMINISTRATIVE PROCEEDINGS (Johns Hopkins University Press, 1941), pages 1-14.
50. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 655 (1952).
51. See Report of Committee on Hearing Officers of the President's Conference on Administrative Procedure (1954).
52. Such stature is particularly vital to due process where entitlement to money awards, or the imposition of penalties are reviewed pursuant to hearings, as prescribed by the Administrative Procedure Act (*e. g.*, Hearings before Referees or Hearing Examiners of the Appeals Council, Social Security Administration and the Federal Power Commission, which may involve substantial amounts).

The Fifth Amendment and Congressional Investigations

(Continued from page 436)

claimed where the liability would be under military law. Usually military authorities will not try a person who has been previously tried by federal authorities for the same offense. However, in the case of *United States* v. *Knudson*,[48] the accused Knudson, a Chief Engineman in the Navy, petitioned the Secretary of the Navy on May 5, 1952, for relief from trial by court martial for a sex crime, on the ground that he was tried and acquitted in a California state court on April 4, 1952, for the same offense. The United States Court of Military Appeals rejected the theory of double jeopardy and stated:

> The same acts when committed in a State may constitute two offenses, one against the United States and the other against the State. In such a case trial by a State court does not bar trial by Court-Martial. In so far as the accused's motion was based on the ground that jeopardy attached by reason of his trial by the State of California, it was without merit.

The conviction of accused by court-martial was upheld.

In *Quinn* v. *United States*,[49] the petitioner was convicted for refusing to answer a question before a subcommittee of the Committee on Un-American Activities of the House of Representatives as to his alleged membership in the Communist Party. Clearly an answer to the question might have tended to incriminate him, and consequently he was entitled to claim the privilege. The Court said, "It is agreed by all that a claim of the privilege does not require any special combination of words. Plainly a witness need not have the skill of a lawyer to invoke the protection of the Self-Incrimination Clause. If an objection to a question is made in any language that a Committee may reasonably be expected to understand as an attempt to invoke the privilege, it must be respected both by the Committee and by a Court in a prosecution under Section 192" (2 U.S.C.A. 192). The case was remanded with directions to enter a judgment of acquittal.

In invoking the privilege, however, the witness assumes the risks of being held in contempt for refusing to answer pertinent questions.

Sinclair v. *United States*[50] points out that:

> The gist of the offense is refusal to answer pertinent questions. . . . Intentional violation is sufficient to constitute guilt [of contempt].

G. Waiver of the Right To Use the Privilege

The witness may waive his privilege by voluntarily giving incriminating testimony.[51] It has been said that it is doubtful if this rule, which is considered necessary for a fair adversary proceeding, should be applied to congressional investigations.[52] There is a basis for considering that the elimination of the waiver doctrine might serve to encourage testimony and minimize the need for immunity.[53] The theory seems to be that a witness must say everything or nothing at all, in order to be fair to the opposing party, and since there is no adversary party in legislative or grand jury proceedings, it may be contended that the waiver theory is not applicable.

A witness may refuse to answer any incriminating question not covered by a grant of immunity. A witness may have difficulty in determining whether a particular question is within the scope of immunity granted him. In view of the difficult position in which the witness is placed he should be protected in answering any question unless it clearly has no relationship to the transaction covered by the immunity. The Court in any subsequent prosecution should construe the immunity very broadly. When a question is clearly beyond the scope of immunity, the witness must claim his privilege. If he fails to do so and answers the questions, the privilege will have been waived.[54] A witness, under such circumstances, may later face prosecution in the courts without then being able, at that late date, to avail himself of the privilege of the Fifth Amendment with respect to the evidence he had previously given after the waiver.

A very recent case illustrates further how an accused may be considered to have waived his privilege. In *State* v. *Marsin*,[55] it appears that defendant voluntarily appeared in a civil hearing and claimed to be the owner of property which was determined to be stolen. When asked questions about his ownership, defendant claimed his constitutional privilege against self-incrimination. The Court held that neither the Federal nor Arizona Constitutions' guarantee of privilege against self-incrimination barred evidence, in a criminal prosecution, that defendant had voluntarily appeared as claimant of the stolen property in an earlier civil proceeding.

> These guarantees stand as a shield against oppression; they were not intended to absolve a wrongdoer of every consequence of his criminal folly. Where one voluntarily enters into a proceeding and as a participant seeks

48. 7 C. M. R. 439, 442 (1952).
49. 349 U. S. 155, 162 (D. C. 1955).
50. *Supra*, note 24 at 299.
51. *Rogers* v. *United States*, *supra*, note 39.
52. See *Comment*, 61 YALE L. J. 105, 108 (1951).
53. See letter from Dean Griswold to Senator Kilgore, 99 CONG. REC. 8345 (1953).
54. *Poretto* v. *United States*, 196 F. 2d 392 (5th Cir. 1952).
55. Ariz. Sup. Ct. (Daniel, J.) February 19, 1957, 25 L. W. 2411 (March 3, 1957).

a material advantage he would not otherwise gain the essence of the prohibition against compelling testimony does not exist, for the element of compulsion is not present.

Since this defendant was not compelled to participate in the civil proceeding, his acts must be held to be voluntary—even the act of claiming the privilege. That his action in claiming the privilege might later be subject to inspection or investigation to determine its motivation is no more protected by the Constitution than any other act that is committed without coercion and might have some bearing on guilt or innocence.

H. Compulsory Testimony Statute and Its Effects

The merits of the privilege have been questioned in our modern society. We are familiar with other legal doctrines which bar evidence obtained by physical and mental compulsion, but the privilege against self-incrimination permits one to refuse to respond to orderly examination. However, if the privilege should be eliminated it might well lead to perjured testimony rather than truthful incriminating testimony. There is a strong feeling in our system of government that to compel a man to reveal his own guilt is inherently unjust and that the privilege maintains the dignity and humanity of our legal system.[56]

Immunity statutes have developed as compromises to permit the compelling of testimony from the witness and yet protect him from prosecutions as a result of such testimony. The first federal immunity statute, enacted in 1857 and applicable to congressional committees, was much abused because it granted immunity with respect to "any fact or act touching which he [the witness] shall be required to testify. . . ."[57] Government officials voluntarily testified before committees in order to receive complete immunity for all wrongdoing.[58] Since the answers of the witness did not have to be responsive to the questions asked, he could obtain an "immunity bath", that is, immunity from prosecution regarding any matter he decided to disclose.[59]

Accordingly, this provision was replaced in 1862 by a more restrictive statute providing only that "the testimony [of a witness] . . . shall not be used as evidence in any criminal proceeding against such witness. . . ."[60] In *Counselman* v. *Hitchcock*[61] the Supreme Court held that a similarly worded statute[62] relating to judicial proceedings could not be used to compel testimony because mere prohibition on the later use of testimony does not provide the protection guaranteed by the Fifth Amendment.

For additional authorities and discussion concerning the development and use of the compulsory testimony statute and its effects, see footnote 63.

I. Doctrine of Recent Decisions

It appears appropriate to turn to a few recent decisions of the courts to see how they have interpreted and applied the principles established by the authorities previously discussed.

The case of *United States* v. *Icardi*[64] concerns the question of Icardi's connection with the death of Major William V. Hollahan while a member of the Armed Forces on assignment to the Office of Strategic Services in the Italian Campaign of 1944. The subcommittee of the House Armed Services Committee, by letter, invited Icardi to testify even though it already had in its possession sufficient information on which to base its report to the Congress. The Chairman testified in court that "to the best of his recollection, before asking Icardi to testify, he discussed with his colleague and counsel for the subcommittee the calling of Icardi, putting him under oath, and the possibility of a perjury indictment as a result of Icardi's testimony".

The District of Columbia Court stated:

> Assuming, however, that the subcommittee was functioning as a competent tribunal when Icardi gave the testimony upon which the indictment is based, the court holds, as a matter of law, that the false answers defendant is charged with having given did not relate to a "material matter". . . . There are, however, limitations upon the investigative power of the legislature which must be considered in any determination of materiality. The investigation must be to aid in legislation. *McGrain* v. *Daugherty*, *supra*, 273 U.S. at page 178, 47 S. Ct. 319. "Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and Judiciary". *Quinn* v. *United States*, 349 U.S. 155, 161, 75 S. Ct. 668, 672, 99 L. ed. 964.

Accordingly, the court directed a verdict of acquittal for the defendant.

However, the case of *Slochower* v. *Board of Higher Education of New York City*[65] involved a teacher discharged under a section of the New York City Charter, without notice and hearing, because, while testifying before a federal legislative committee, he refused to answer questions concerning his membership in the Communist Party in 1940 and 1941, on the ground that his answer might tend to incriminate him. Held: Summary dismissal violated the due process clause of the Fourteenth Amendment.

The case of *United States* v. *Rosato*[66] demonstrates that the privilege of the Fifth Amendment may be used in the military service. Here the accused was convicted by a general court martial in Germany for failure to obey a lawful order of his commanding officer to furnish a specimen of his handwriting by printing the alphabet. The conviction was set aside and the charge dismissed. The United States Court of Military Appeals held that the conviction was contrary to the safeguards provided to an individual by the Fifth Amendment of the Constitution and stated:

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56. *Brown* v. *Walker*, *supra*, note 5 at 628 (dissenting opinion).
57. 11 Stat. 155 (1857).
58. Cong. Globe, 37th Congress, 2d Session, 428 (1862).
59. King, *Immunity for Witnesses: An Inventory of Caveats*, 40 A. B. A. J. 377, 380 (1954).
60. 12 Stat. 333 (1862).
61. *Supra*, note 29.
62. 24 Stat. 383 (1889).
63. *Adams* v. *Maryland*, 347 U.S. 179 (1954); S. Rep. No. 725, 82d Cong., 1st Sess. 95 (1951); 27 Stat. 443 (1893), 49 U.S.C. 46 (1952); 18 U.S.C.A. 3486 (Supp. 1954); *United States* v. *Brennan*, 214 F. 2d 268 (D.C. Cir. 1954); 52 Stat. 942 (1938), as amended; 2 U.S.C. 192, 194 (Supp. 1954); 55 Col. L. Rev. 635 (1955).
64. 140 F. Supp. 383, 384, 388 (1956).
65. 350 U.S. 551 (1955).
66. 11 CMR 143, 144, 146, 147 (1953).

Without exception courts have declared that this Amendment must be construed liberally to prevent stealthy encroachment upon, or gradual depreciation of, the rights secured by it.

* * *

The compulsory production of a handwriting specimen goes far beyond the taking of a fingerprint, placing a foot in a track, an examination for scars, forcibly shaving a man or trimming his hair, requiring him to grow a beard, or try on a garment. Such instances do not involve an affirmative conscious act on the part of the individual affected by the demand. Whereas the printing of the alphabet involves a conscious exercise of both mind and body, an affirmative action.

The case of *Emspak* v. *United States*[67] is a companion case to *Quinn* v. *United States, supra.* Challenged in each proceeding is a conviction under 2 U. S. C. 192 in the District Court for the District of Columbia. The two cases arose out of the same investigation by the Committee on Un-American Activities of the House of Representatives. The subcommittee's hearings had previously been announced as concerning "the question of Communist affiliation or association of certain members" of the union and "the advisability of tightening present security requirements in industrial plants working on certain Government contracts".

Emspak declined to answer certain questions which dealt with his associations and affiliations. He based his refusal on "primarily the first amendment, supplemented by the fifth". In directing a judgment of acquittal the Supreme Court said, "We have no doubt that the eight questions concerning petitioner's alleged membership in the Communist Party fell within the scope of the privilege."

The Court also pointed out that the committee did not indicate its overruling of the objection by directing the petitioner to answer, and stated:

> In the absence of such committee action, petitioner was never confronted with a clear-cut choice between compliance and non-compliance, between answering the question and risking prosecution for contempt.

Watkins v. *United States*[68] concerned a prosecution for contempt for refusal to answer questions put by a congressional subcommittee of the Committee on Un-American Activities. The United States District Court for the District of Columbia found the accused guilty and he appealed. The Court of Appeals affirmed the decision and held that the joint resolution authorizing the Committee on Un-American Activities to investigate subversive and un-American propaganda activities authorized inquiry into infiltration by Communists into labor unions and authorized questions of witness as to whether he knew certain individuals as Communists. Watkins willingly testified before the committee concerning persons he knew to be members of the Communist Party and whom he believed still to be, but he declined to testify "about persons who may in the past have been Communist Party members or otherwise engaged in Communist Party activity but who to the best of my knowledge and belief have long since removed themselves from the Communist movement".

The Supreme Court in an opinion by Chief Justice Warren, reversed the conviction and held that where particular inquiry by a subcommittee of the Un-American Activities Committee purported to involve Communist infiltration in labor, but most of the witnesses had no connection with labor, and the questions asked of defendant witness, which he refused to answer, involved persons almost a quarter of whom were not labor people, and the chairman's only response to the defendant's objection was that the subcommittee was investigating subversion and subversive propaganda, the defendant had an insufficient basis for determining the pertinency of the questions, and his conviction under the statute for refusal to answer was invalid under the due process clause.

Mr. Justice Clark dissented and stated:

> So long as the object of a legislative inquiry is legitimate and the questions propounded are pertinent thereto, it is not for the courts to interfere with the committee system of inquiry. . . . To carry on its heavy responsibility the compulsion of truth that does not incriminate is not only necessary to the Congress but is permitted within the limits of the Constitution.

The current congressional investigations will raise a number of legal questions concerning the invocation of the Fifth Amendment, jurisdiction, waiver and the contempt power. Some witnesses appearing before the Senate's Permanent Subcommittee on Investigations in January, 1957, refused to answer questions on the ground that the Committee lacked jurisdiction. Some of these witnesses have already been indicted for contempt.

Meanwhile, the inquiry has been shifted to the Select Committee on Improper Activities in the Labor or Management Field of the United States

67. 349 U.S. 190, 199 (1955).
68. 233 F. 2d 681, 683 (1956); 77 S. Ct. 1173 (1957).

Senate, and at least one of the witnesses indicted for refusing to testify before the first Senate Committee in January, 1957, appeared and testified freely, in March, 1957, before the second Senate Committee.

J. Conclusions

It is concluded that the privilege against self-incrimination is of great value, a protection to the innocent even though a shelter to the guilty, and a safeguard against unfounded or tyrannical prosecutions.

It is further concluded that the Fifth Amendment is as important and valid in our system of government today as it was when it became part of our Federal Constitution in 1791; that it is not outmoded or obsolete; that it is capable of meeting the needs of modern society; that it has admirably withstood the test of time; that it should not be changed; that it was shaped by our forefathers as a cornerstone to our democratic way of life; that we must preserve it at all costs; that it should and shall continue to shine as a beacon light symbolizing the rights of the individual against the oppressive and collective power of the state; and that we must never forget that it is better that the guilty should go unpunished rather than to have one innocent man suffer unjustly. These things are the basic differences between our form of government and way of life and that of a communistic state. Let us maintain ours.

The Trade Court Proposal

(Continued from page 444)

to issue cease and desist orders subject to the enforcement provisions described above, will be able to dominate and control the entire American Government, or any part of it.

Possible Risks of Loss

In evaluating the proposal in Resolution 4, one should consider, in addition to the questionable validity of the basic arguments in its favor, the risks of loss which might be incurred in carrying out the proposal.[43]

Most cases in which the Federal Trade Commission and its staff achieve persuasive compliance with the laws administered do not require hearings, arguments, briefs, findings and the like. Through its Bureau of Consultation, the Commission carries on a continuing program of voluntary stipulations in appropriate cases. Stipulations are written agreements, approved by the Commission and executed by its Chairman and Secretary, and by the individual or officers of the business unit charged with violation of the law. The stipulation contains a statement of facts of violation and an agreement by respondent to cease and desist from certain specified practices. Since 1925 when the first such stipulation was approved, the Commission has approved 8,870 stipulations. In 1956, 142 stipulations were issued without resort to formal proceedings.

Since 1914, the Commission has issued 4,925 orders to cease and desist, but, in recent years, a large proportion of these have been consent orders. Any time after the issuance of a complaint, and prior to presentation of evidence, or thereafter if joined by counsel for the Bureau of Litigation, respondent may move to defer reception of evidence to allow time to negotiate a consent cease and desist order disposing of the whole or any part of the case. A consent agreement contains a waiver by the respondent of his right to contest the validity of the order. If counsel for both sides reach an agreement, it is submitted to the hearing examiner. If the latter accepts the agreement, he issues a cease and desist order in accordance therewith, which is then generally adopted by the Commission. Such orders have the same effect and validity as those issued after a contest on the facts or the law. Of 169 orders to cease and desist issued during 1956, 132 (over 78 per cent) were processed by consent order procedure.

This negotiated administration and enforcement of the law through stipulations and consent settlements has definite advantages for respondents, their competitors and the public. Compared with litigation, either administrative or judicial, the process is cheap and quick. It also constitutes effective law enforcement.

Without its power to issue cease and

43. For a gloomy set of predictions as to the results of such a step, see Arpaia, *The Independent Agency—A Necessary Instrument of Democratic Government*, 69 HARV. L. REV. 483 (1956).

The subject of specialization has been debated in recent issues of the JOURNAL. Joiner, *Specialization in the Law: Control It or It Will Destroy the Profession*, 41 A.B.A.J. 1105 (1955); Wham, *Specialization in the Law: The Public Need Must Be Better Served*, 42 A.B.A.J. 39 (1956); Siddall, *Specialization in the Law: A Retort to Professor Joiner's Call for Control*, 42 A.B.A.J. 625 (1956). Adoption of the Trade Court proposal would probably further what I regard as an undesirable trend toward specialized bars.

At the present time, legal work before the Federal Trade Commission is shared by numerous law firms all over the country. In the last 100 complaints docketed by the Federal Trade Commission in 1956, the respondents were represented by 123 different law firms scattered throughout the country—Wilmington, California; Seattle, Washington; Baraboo, Wisconsin; Muskegon, Michigan; Fort Worth, Texas; Louisville, Kentucky; Jacksonville, Florida; Hartford, Connecticut; Adams, Massachusetts; Woonsocket, Rhode Island, to name a few. Only six of the 123 law firms were attorneys of record in more than one case, and no law firm had more than three cases.

desist orders in contested cases and thereby define authoritatively "unfair methods of competition" and "unfair or deceptive acts or practices", the Commission's stipulations and consent settlements could not be so readily achieved, nor would they be of much effect. To achieve the same amount of regulation as the Federal Trade Commission now performs, a Trade Court might have to hear three times as many litigated cases.

The administrative process may be particularly suitable for resolving certain types of disputes. One Supreme Court Justice referred to the administrative process as "an indispensable adjunct to modern government".[44] The reasons for this indispensability may be found in a presidential veto message on an earlier administrative court bill:

> The administrative tribunal or agency has been evolved in order to handle controversies arising under particular statutes. It is characteristic of these tribunals that simple and non-technical hearings take the place of court trials, and informal proceedings supersede rigid and formal pleadings and processes. A common-sense resort to usual and practical sources of information takes the place of archaic and technical application of rules of evidence, and an informed and expert tribunal renders its decisions with an eye that looks forward to results rather than backward to precedent and the leading case.[45]

In 1937, the Attorney General of the United States, in response to the President's direction that the Attorney General investigate identical bids on steel products, replied:

> The administrative and quasi-judicial remedies in the hands of the Federal Trade Commission may be better adapted to the control of the subject matter of this particular complaint than action by the Department of Justice. The identical bids in the steel industry are produced, in part, by the basing point system of price determination. This system, long used in the steel industry, not only affects the manufacturers who utilize it and the consumers who are subject to it, but it also presents economic and social questions due to the fact that communities as well as plants have been located and developed with reference to the price structure developed by this system. The machinery of the courts is not geared to the handling of the social and economic factors necessarily involved; and many persons and communities seriously affected cannot be parties to a court proceeding under the Antitrust Laws. It appears therefore that a problem is presented which can be more satisfactorily investigated and dealt with through the more flexible remedies of the Federal Trade Commission.[46]

The Supreme Court has recognized that there may be a particular value in the Federal Trade Commission's having jurisdiction over certain specialized and complicated areas. The Court has stated:

> We are persuaded that the Commission's long and close examination of the questions it here decided has provided it with precisely the experience that fits it for performance of its statutory duty. The kind of specialized knowledge Congress wanted its agency to have was an expertness that would fit it to stop at the threshold every unfair trade practice . . . .
>
> In the present proceedings the Commission has exhibited the familiarity with the competitive problems before it which Congress originally anticipated the Commission would achieve from its experience.[47]

The Congress has indicated its endorsement of the valuable role of the Federal Trade Commission in its present form in recent years by giving the Commission responsibility for enforcement of the Wool, Fur and Flammable Fabrics Acts.[48]

The Hoover Commission Task Force found that the Federal Trade Commission possesses a "special competence".[49] I suggest that such special competence largely would be lost through enactment of the Task Force's proposals.

Resolution 4 appears to me to be grounded on doubtful analogies, based on little understanding of the present operation of the Federal Trade Commission, and would weaken or destroy procedures recognized as valuable by representatives of every branch of the Federal Government. Why then, has the proposal been made? The answer may be found in the words of a student and master of our law written eighteen years ago:

> From the very beginning the administrative tribunal has faced the hostility of the legal profession . . . . The administrative tribunal . . . is often penetrating into new fields where precedents do not exist. Its concern is with the future more than with the past, and it counts the probable progeny of its decisions as of more importance than their ancestry . . . . Those who dislike such activities of the government as regulation of the utility holding companies, of labor relations, or of the marketing of securities, rightly conceive that if they can destroy the administrative tribunal which enforces regulation, they would destroy the whole plan of regulation itself.[50]

44. Justice Jackson, *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 482 (1952).
Jackson had stated in an earlier opinion his dissatisfaction with judicial determination of questions of substantial lessening of competition or tendency to create monopoly. "I regard it as unfortunate that the Clayton Act submits such economic issues to judicial determination. It not only leaves the law vague as a warning or guide, and determined after the event, but the judicial process is not well adapted to exploration of such industry-wide and even nation-wide questions." *Standard Oil Co. v. United States*, 337 U.S. 293, 322 (1949).

45. Franklin Roosevelt, 86 CONG. REC. 13942 (1940).

46. White House Press Release, April 27, 1937.

47. *Federal Trade Commission v. Cement Institute, et al.*, 343 U.S. 373, 381 (1952).
In a poll of United States District Court Judges recently conducted by the Senate Judiciary Committee, three out of four judges replying opposed the creation of a special court for the trial of antitrust cases. S. Rep. No. 128, at page 10, 85th Cong., 1st Sess. (1957).

48. Wool Products Labeling Act of 1939, 54 Stat. 1128, 15 U.S.C. §§ 68-68j (1952); Fur Products Labeling Act, 65 Stat. 175 (1951), 15 U.S.C. §§ 69-69j (1952); Flammable Fabrics Act, 67 Stat. 111 (1953), 15 U.S.C. §§ 1191-1200 (Supp. III 1956).

49. Commission on Organization of the Executive Branch of the Government, Task Force Report on Legal Services and Procedure 252 (1955).

50. Jackson, *The Administrative Process*, 5 JOURNAL OF SOCIAL PHILOSOPHY 143, 146-7 (1940).

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